



EDINBURGH
UNIVERSITY
LIBRARY

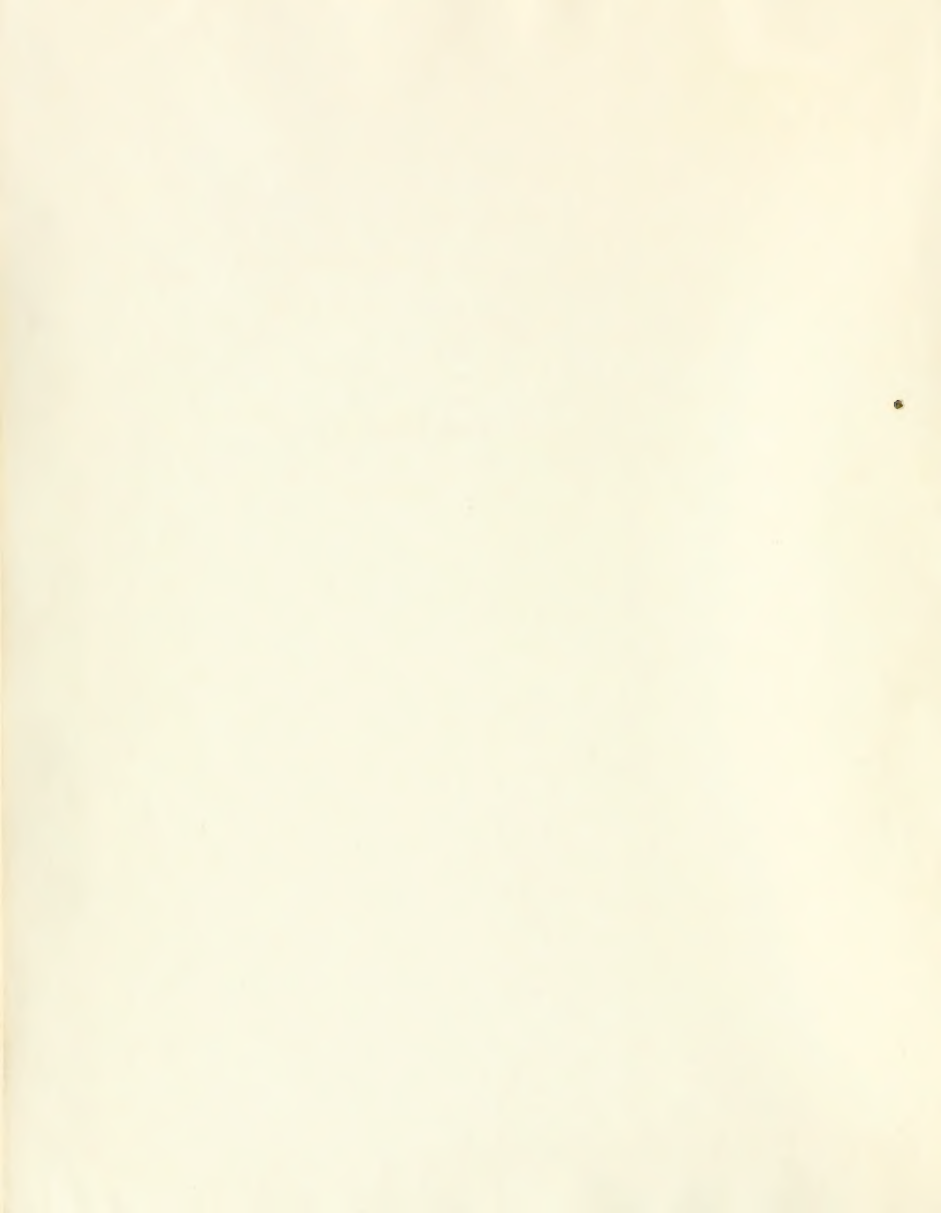
KK. 43.10.7.

E.B. 346(41)4 Con.



Digitized by the Internet Archive
in 2009

<http://www.archive.org/details/sessionpapers01>



INDEX

Page

1. Mrs. Elizabeth Dunbar & husband agt. Mr. Sean Harty 1
Is this any thing but stuff & a vulgar cut down through the gut 2
2. Creditors of Minnistry agt. Lady McKerrin 3
3. George Heddrie agt. George Dempster 4
4. Theopland Sinclair agt. Sinclair 5
an admirable case upon the question of a marriage of King in a
5. George Heddrie agt. Heritors of Inverness 6
an admirable case upon the question of prescription
6. Alexander Sinclair against Sinclair 7
an admirable case upon the question of prescription
7. Alexander Moreau agt. James Fra 8
8. James Donaldson against James Fra 9
9. Alex. James of Lathlaw agt. James 9



This image shows a blank, aged, cream-colored page, likely an endpaper or flyleaf of a book. The paper has a slightly textured appearance with some faint smudges and discoloration, characteristic of old paper. The text from the reverse side is visible through the paper, appearing as faint, mirrored handwriting. The overall tone is warm and historical.

11. 1.
JULY 4th, 1766.

Unto the Right Honourable the Lords of Council and Session,

(S.S.)
THE
P E T I T I O N
O F

Mrs. ELIZABETH DUNBAR, lawful Daughter of, and general Disponee, and Executrix confirmed, to the deceased Sir *Patrick Dunbar* of *Northfield*, Baronet, and of *James Sinclair* of *Durin*, Esq; her Husband, for his Interest,

Humbly sheweth;

THAT *George Viscount of Tarbat*, afterwards Earl of *Cromerty*, having purchased Part of the Lands and Estate that belonged to the deceased Sir *James Sinclair* of *Mey*, at a judicial Sale before your Lordships, was decerned, by the Decreet, dividing the Price, to pay to those having Right to two Decreets of Apprising, to be hereafter mentioned, affecting that Estate, the two following Sums, viz. the Sum of 5154*l.* 15*s.* 10*d.* and that of 331*l.* 9*s.* 10*d.* both *Scots*, with Interest from *Whitsunday* 1694, and in Time coming, during the Not-payment. Feb. 21st 1695.

The Persons who had originally Right to these Apprisings, which were both compleated by Charter and Seafine in 1664, were *Alexander Cuthbert*, Provost of *Inverness*, and *Alexander Dunbar*,
A

Dunbar, Merchant there ; and *Dunbar* having made over his Apprifings, &c. to *Alexander Cuthbert*, both Apprifings came by Progreſs, into the Perſon of the deceased *John Cuthbert* of *Plaids*, Grand-nephew, and Heir of the Provost.

Plaids happened ſoon to be reduced to great Diſtreſs, on Account of the Debts he owed. In this Situation the deceased *Robert Innes* of *Mondale*, and *Alexander Clark*, Baillie of *Inverneſs*, interpoſed their Credit for his Relief, out of mere Compaſſion, as well as out of Regard to his deceased Father, who had been Town-clerk of *Inverneſs*, and their intimate Friend.

And, by theſe Means, he was ſaved from rotting in Jail, a Danger, to which, had it not been for them, he was otherwiſe greatly expoſed ; as it does not appear, that any others of his Friends would advance a ſingle Penny to relieve him.

Innes and *Clark* became in this Way conſiderable Creditors to *Plaids*, and were moſt juſtly intitled to be ſecured of their Re-imburſement by him. He did therefore make over in their favour the Money or Debt, decerned in Manner foreſaid, to be paid by the Earl of *Cromerty*, with the Lands of *Weſt Caniſby*, alſo adjudged by the foreſaid Decreet, to thoſe having Right to the two Apprifings ; and another Debt of 1071 l. 12 s. 4 d. *Scots*, with Intereſt, from the foreſaid Term of *Whitſunday* 1694, likewise decerned to be paid by *William Innes*, who purchaſed another Part of the Eſtate of *Mey*.

In this view, *Plaids* executed two ſeveral Diſpoſitions, the firſt dated, 21ſt *October* 1709, and the other, the 30th of *January* 1710, by which he ſold, annalized, and diſponed to, and in favour of, the ſaid *Robert Innes* and *Alexander Clark*, their Heirs or Aſſignees whatſoever, heritably and irredeemably, all and hail the Subjects above mentioned, with the Lands of *Mey*, and others ſpecially adjudged by the foreſaid Decreet of Appriſing, which were the Ground of his Claim
upon

upon that Estate, " With full Power to them, Discharges,
 " Renunciations, *Dispositions*, or *Assignations* to grant, which
 " shall be sufficient to the Receivers, and, generally, *every*
 " *other thing* thereanent to do, use, and exerce, which
 " *I might have done before the granting of this present Disposi-*
 " *tion and Assignation*, which I bind and oblige me, my Heirs
 " and Successors, to warrant from my own proper Fact and
 " Deed alienarly."

It was also thought proper, the more effectually to vest the
 Subjects, and complete Titles thereto, in the Persons of *In-*
nes and *Clark*, that *Plaids* should grant them a Bond for
 50,000 Merks, for the Purpose of leading an Adjudication a-
 gainst himself, on a Charge to enter Heir to his said Grand-
 uncle, the Provost, which was accordingly done, by Decreet, June 29th
1710.
 adjudging from him the foresaid Subjects, with certain Houses
 and Tenements in *Inverness*.

By virtue of these Dispositions, and of the said Adjudica-
 tion, it is perfectly clear, that *Plaids* was fully *denuded* in
 1710, and that *Innes* and *Clark* did then acquire a compleat
 Right to the foresaid Debt, affecting the Lands purchased by
 the Earl of *Cromerty*.

The Conveyances made in their favour were, *ex facie*, ab-
 solute and irredeemable ; but *Innes* and *Clark*, by their Back-
 bonds, of even Dates with the two Dispositions, and recit-
 ing the same, with the Bond for 50,000 Merks, became
 bound to render an Account to *Plaids*, his Heirs and Assign-
 nees, of all Sums, which they should recover, by virtue of
 the Dispositions or Bond. But it was thereby specially pro-
 vided, that, out of the *first and readiest* of the Moneys recover-
 ed by them, they should be allowed to *retain in their own*
Hands, as much as would satisfy and pay them of all Debts,
 and Sums of Money, due by *Plaids* or his Father or Grand-
 uncle, which they either had already satisfied and cleared, or
 should thereafter satisfy and clear ; with all Sums, which
 they either had advanced, or should advance, to *Plaids* him-
 self,

self, and all those expended in making the Subjects effectual; and they being once fully satisfied, and paid of all the said Sums expended, and to be expended by them, the Overplus (if any) was to be paid by them to *Plaids*, and his forefairs. It was further provided, that they should be accountable for their Intromissions only, and should not be prejudged or limited, by the Back-bonds, in the Power and Faculty of *disposing* the Subjects at *pleasure*.

Thus, all which remained in the Person of *Plaids*, after making these Deeds, or which he could convey to any other, or could be carried by Diligence from him, was the naked *Reversion* only, or Right of compelling *Innes* and *Clark* to make Payment of any *Overplus* that should remain *after clearing* the Debts *specially charged*, and by the Back-bond really secured, on the Subjects disposed.

Innes and *Clark*, on the Faith of the Security thereby acquired to them, are proved, by Vouchers produced, to have transacted, advanced, expended, and paid for *Plaids*, Debts and Monies, now amounting to no less than 36,000 *l. Scots*. These Payments they made out of their own Money, and it cannot be pretended they touched or recovered a single Penny belonging to him.

Nor can they be charged with the least Inattention to his Interest on that Account; on the contrary, they appear to have done every thing in their Power for him; and it was indisputably generous to advance Sums, amounting now to the large one above mentioned. They were themselves, at least, equally interested in recovering the Money from the Earl of *Glenmorris*, as their Reimbursement depended upon it. They did, therefore, not only intimate the Dispositions before mentioned, to his Lordship, but did also make many Applications to him for Payment; and, finding all these ineffectual, they went the Length of giving in a Petition to this Court, praying for Registration of the Bond he had granted for the Price; but the Petition being appointed to be answered, the Earl
pled

pled Compensation, with several other Defences, and Execution was refused to be summarily awarded.

Thereafter, *Innes* and *Clark* made several Attempts to settle Matters amicably with the Earl, and actually entered into a Submission with him, as they were authorised to do; but this Submission, being shifted or delayed by his Lordship, came to nothing; and it appears, that they even attempted a Reduction of his Counter-claims against *Plaids*, to pave the Way for recovering the Debt itself.

Thus Matters were obliged to lie over for several Years, till *Alexander Clark*, one of the Disponees, having been nominated Executor to the deceased Mr. *Robert Frazer*, Advocate, Sir *Patrick Dunbar*, the Petitioner's Father, became Cautioner for him in the Confirmation, and as Sir *Patrick* was thereafter decerned to pay very considerable Sums for *Clark*, on account of that Cautionry; particularly, by a Decreet-arbitral pronounced by the late Lord *Elchies*, *Clark* did, Octob. 21,
1719. as he was in Justice bound to do, for the Relief of his Cautioner, dispoine and make over to Sir *Patrick Dunbar*, his Heirs and Assignees, the foresaid two Apprisings, and all following thereon, the Decreet of Division, and Sums thereby due, with the foresaid Lands of *West Canisby*, and Mails and Duties thereof, from *Whitsunday* 1719.

The Disposition granted by *Clark* proceeds on the Narrative of the foresaid Cautionry, and of the Right which Sir *Patrick* had to Relief, yet is in itself simple and absolute, assigning and disposing, “ in favour of Sir *Patrick*, his
“ Heirs and Assignees, all and haill the principal Sums, Annualrents and Penalties, contained in the said Adjudications and Apprisings, whereto the said *John Cuthbert* had
“ Right against the said Estate, with the said Adjudications
“ and Apprisings themselves, accumulate Sums in them contained, with their haill Grounds and Warrants, and haill
“ Lands, Tiends, and others affected by them, and with
“ Power to them to uplift and receive the principal Sum,
B “ Annualrents,

“ Annualrents, and Penalty, contained in the Bond granted
 “ by the saids Earls of *Cromerty*, or either of them, and, if
 “ needs be, to call, charge and pursue, set and raise Te-
 “ nants, and grant sufficient Discharges, and, generally, to
 “ do every other thing which he might have done himself,
 “ before granting thereof.”

In this Manner Sir *Patrick Dunbar* acquired full Right to all the Interest *Clark* had in the foresaid Debt; and as *Clark* had been obliged to pay for *Innes* very large Sums, in which they were jointly bound, and of which he was entitled to be relieved, *pro rata*, these, with the Rights to and Vouchers of them, *Clark* did also, by an Assignment of the same Date, make over to Sir *Patrick*; and on that Title Sir *Patrick* obtained himself decerned Executor-creditor to *Innes*, by the Commissary of *Moray*; and both the Disposition and the Assignment before mentioned, from *Clark* to Sir *Patrick*, were thereafter intimated to the Earl of *Cromerty*, as appears from an Instrument of Intimation produced.

Feb. 18.
1722.

Thereafter, Sir *Patrick* charged *Jonathan Innes*, eldest Son and apparent Heir of the said *Robert*, to enter Heir to his Father, and obtained a Decreet, *cognitionis causa*, on his Renunciation, against the *hereditas jacens* of his Father, which was afterwards compleated by Decreet of Adjudication led against him at the Instance of the Petitioners, as in the Right of Sir *Patrick Dunbar*.

Nov. 14th,
1723.

Thus Sir *Patrick Dunbar*, the Petitioner's Father and Author, Being vested in the full Right of all the Premises, was certainly entitled to draw the foresaid Sums decerned to be paid by the Earl of *Cromerty*; but the Affairs of that Family had gone, in the mean time, into great Disorder, and he was particularly prevented from recovering Payment, by the Attainder of the late Earl, on account of his Accession to the Rebellion 1745.

Sir *Patrick*, too, was an old Man, and lived in the remote County of *Caitness*; his Doer, the deceased Mr. *Ludovick Brodie*,

Brodie, is also known to have been greatly advanced in Years, and his Memory was much gone: Six Months, after the Survey appointed to be made on that Occasion, were all the Time allowed to Creditors for presenting their Claims on the forfeited Estates; and as no Notification of the Surveys was directed to be made in the publick News-papers, it was owing to that, and the other Causes already suggested, that neither Sir *Patrick Dunbar*, nor his Doer Mr. *Brodie*, entered a Claim for the fore said Debt on the forfeited Estate of *Cromerty*.

But Mrs. *Jane Hay*, pretending Right to the fore said Debts due by the Family of *Cromerty*, under the Titles after mentioned, entered her Claim, which was also, after some Litigation, sustained by your Lordships, with the Deduction therein mentioned.

Her Title was not a Disposition to the Debt or Subject itself, but an Assignment granted by *Plaids*, in favour of *John Cuthbert of Castlehill*, her Husband, to the fore said *Back-bonds* only, and, of course, all the Right which she had, was no more than a Right to call the Petitioner, or her Authors, to account for the Overplus, if any remained, of the Funds aforesaid, as appears from an Extract of the Assignment itself, July 17,
in Process, which recites the Dispositions made by *Plaids* in 1713.
favour of *Innes and Clark*, with the *Back-bonds* granted by them, and subsumes, “ Now, seeing *John Cuthbert* younger
“ of *Castlehill* has, at this Date, advanced and delivered to
“ me an certain Sum of Money for making the following Right,
“ wherewith I hold myself sufficiently satisfied, renouncing
“ all Exceptions in the contrair, therefore, wit ye me, the said
“ *John Cuthbert* (of *Plaids*) to have assigned and disposed,
“ likeas, I, by thir Presents, assign and dispo ne to, and in
“ favour of the said *John Cuthbert*, his Heirs and Assignees,
“ the said three several *Back-bonds* granted by the said *Robert*
“ *Innes* and Mr. *Alexander Clark*, haill Heads, Tenor, Import,
“ and Contents thereof, Sums of Money and others thereby
“ due,

“ due, &c. with full Power to them to ask, crave, and obtain, just Count, Reckoning, and Payment of the said *Robert Innes* and *Mr. Alexander Clark* their Intromission, by virtue of the said Disposition, in the Terms of the said Back-bonds, &c. and I have herewith delivered to him the three principal Back-bonds, with an Inventory of the several Writs delivered by me to the said *Robert Innes* and *Mr. Alexander Clark*, signed by them and me, &c.”

The said *Mrs. Jane Hay* is the Disponee as well as the Widow of the said *John Cuthbert of Castlehill*, and that was the Title on which she entered her Claim on the forfeited Estate of *Cromerty*; but the Grounds, necessary for supporting it, being all delivered by *Plaintiffs to Innes and Clark*, at granting the Disposition in their favour, and by them to *Sir Patrick Dunbar*, were obliged to be recovered on a Diligence. *Sir Patrick*, with his Doer, being cited on this Diligence, did then think proper to assert his Right before the late Lord *Woodhall*, Ordinary, appointed for discussing the Claims on the forfeited Estate of *Cromerty*; and his Lordship, by his Interlocutor, expressly reserved to *Sir Patrick*, notwithstanding his producing the Writs called for, all Right and Title which he had to the Subject then claimed by the present Defender.

The Defender, acquiescing in that Interlocutor, proceeded to get her Claim sustained, and *Sir Patrick* was only prevented by Death from commencing an Action, which he was advised it was proper for him to do, for ascertaining his Right to the Debt affecting the foresaid forfeited Estate, and for having it found and declared, by Decree of this Court, against the Defender, *Mrs. Jane Hay*, that he had, on the Titles aforesaid, the prior and preferable Right to the Money, with the best and only Title to uplift, receive, and discharge the same.

That Action, which he was prevented from instituting, the Petitioner has now brought, and it came before the Lord *Gardensson* Ordinary.

The Defender, who had an obvious Interest in protracting the Cause, allowed Decreet to be pronounced against her in Absence, 20th July 1764; and, on entering her Appearance towards the Beginning of next Winter, her principal Defence was, That Sir Patrick, and his Predecessors or Authors, had been satisfied and paid by their Intromissions with the Effects of *Plaids*.

It was answered, 1mo, That the Defence was totally irrelevant, because the Dispositions made in favour of *Innes* and *Clark*, which vested the Subject absolutely in them, did also empower them to uplift the Money: That the Money itself, being still confessedly *in medio*, in the Hands of the original Debitor, or his Successors, could regularly be uplifted by them or their Disponees alone; and as *Plaids* himself, who had given them that Power, and was absolutely denuded in 1710, could not have hindered them from so doing, neither could the Defender, who had no further Right than to the foresaid Back-bonds, that did not give *Castlehill* any Power to hinder *Innes* and *Clark* from uplifting, but, on the contrary, supposed and confirmed that Power, and authorised him, after they should actually have uplifted the Money, to call them to account for the Overplus, *in Terms of the Back-bonds only*.

2do, It was answered, That the Defence was not true in fact, for that the only Funds assigned to *Clark* and *Innes* were the three above mentioned, viz. the Debt affecting the Estate of *Cromerty*, which it was clear had not been uplifted; the other Debt affecting that Part of the Estate of *Mey* purchased by *Innes* of *Brims*, it was denied, had been uplifted either by *Clark* and *Innes*, or by Sir Patrick Dunbar. But the Petitioners, though they were singular Successors, and could not therefore be supposed to know the Intromissions of their Authors, did, however, candidly acknowledge, that they observed, from the Writs in Process, that Sir Patrick Dunbar had Right, in the Year 1719, from Provost *Clark*, to the Lands of *West Canisby*, originally conveyed by *Plaids* to *Innes* and

Clark : That they had been informed these Lands were wadsetted or sold by Sir *Patrick*, to the late *David Sinclair* of *Southdun*, in 1745, for 4447 *l. Scots*, and that they yielded of yearly Rent 103 *l. 13 s. 2 d. Scots* of Money, with 39 Bolls 1 Firlot Bear Farm, out of which there was paid yearly to the Minister of *Canisby* 5 *l. 10 s. 4 d. Scots* Money, and 9 Bolls, 3 Firlots, 3 Pecks, and 2 Lippies Viſtual, with 1 *l. 7 s. Scots* Cefs, yearly, at eight Months. But it is here proper to observe, that even the Rents of this small Mailing, since the 1719, all the Intromissions that has been proved in this Process, together with the Value of the Mailing itself, added to the Debt in question on the Estate of *Cromertie*, is not near equal to the Sums vouched in this Process to have been paid for *Plaids*, by *Innes* and *Clark*, to which the Petitioner has now Right.

The Defender, who affected that she would prove Superintromissions, was, for this Purpose, allowed Diligence after Diligence, during a Dependence of fifteen or eighteen Months, which having been executed against sundry Persons as Havers, and these Persons being examined upon a Commission, nothing, however, was recovered for proving the Alledgeance ; and, at last, after many Inrolments, and repeated Orders, mutual Memorials having been appointed, that for the Lady *Castlehill* was forced into Court.

Dec. 18,
1755. The Lord Ordinary, on advising these Memorials, was pleased to pronounce the following Interlocutor : “ Having
“ considered the above Debate, mutual Memorials, and hail
“ Process, finds, That the Defender, in virtue of her Titles
“ founded upon, and, particularly, in virtue of the Decreet
“ sustaining her Claim, is vested in the Right and Property
“ of the Debt upon the forfeited Estate of *Cromerty*. Finds,
“ That the Pursuer is not intitled to insist, that the Defender
“ shall denude of said Debt in her favour, excepting in so
“ far as the said Pursuer shall instruct Distress, or Payment
“ of the Debt, for Relief of which Sir *Patrick Dunbar* got a
“ Conveyance from *Clark*. Finds, That the Pursuer cannot
“ found

“ found upon the Right of *Innes*, excepting in so far as she
 “ shall instruct that *Innes* was a Creditor to *Plaids*, by Ad-
 “ vances made under the Trust-conveyance to him and *Clark*,
 “ and in so far as the said Pursuer shall also instruct that she
 “ is a just and lawful Creditor to *Innes*; and allows her to
 “ give in an Account of Charge and Discharge accordingly.”

The Petitioner knew well, and it could have been instructed, that Sir *Patrick Dunbar* had been obliged to pay very large Sums, on account of his being Cautioner for *Innes*, and also, that *Clark* was in like manner Creditor to *Innes* to a great Extent; but she was advised, that these Matters had no Connection with the Cause, and that she was not obliged, either to instruct, or to go into any Litigation about them. She did therefore represent to the Lord Ordinary, and his Lordship gave her Relief in part, by the following Interlocutor: “ Having considered this Representation, with Answers,
 “ and again reviewed the former Proceedings, adheres to the
 “ former Interlocutor, in so far as it finds, that the Defen-
 “ der, in virtue of her Titles founded upon, and particular-
 “ ly, in virtue of the Decreet sustaining her Claim, is vest-
 “ ed in the Right and Property of the Debt upon the for-
 “ feited Estate of *Cromerty*; but varies the subsequent Part
 “ of the Interlocutor, and finds, that the Conveyance of this
 “ Debt granted by *Plaids* to *Innes* and *Clark*, was only a
 “ Right in Security for the Sums truly advanced, or to be
 “ advanced, by *Innes* and *Clark* for *Plaids* behoof, and was
 “ a Trust as to the Residue or Reversion, which Trust *Innes*
 “ and *Clark* could not transfer to Sir *Patrick Dunbar*. Finds,
 “ that the Pursuer is intitled to insist, that the Defender shall
 “ denude in her Favour, in so far as the said Pursuer shall
 “ instruct, that *Innes* and *Clark* were Creditors to *Plaids*, and
 “ that she is not obliged to instruct, to what Extent Sir *Pa-*
 “ *trick Dunbar* was Creditor to *Innes* and *Clark*, his Authors;
 “ and ordains her to give in an Account of Charge and Dis-
 “ charge accordingly.”

Feb. 11th
 1766.

But

But the Petitioner, finding she did not still obtain Relief from the grand Difficulty which she wanted to avoid, to wit, that of going into a Count and Reckoning with this aged Defender, without any Necessity, before she should be found and declared, to have Right to uplift and discharge the Money due from the Estate of *Cromerty*, preferred a second Representation, which his Lordship was pleased to refuse, along with a Counter-representation for the Defender, by the following Interlocutor: " Having considered this Representation, and Answers for the Defender, and Answers thereto for the Pursuer, refuses the Desire of both Representations, and adheres to the former Interlocutor."

June 25th
1726.

These Interlocutors the Petitioners must now humbly submit to review, and they are hopeful your Lordships will not hesitate instantly to discern and declare against the Defender, in Terms of their Libel, that they have the prior and preferable Right to the foresaid Money, as well as the best and only Title to uplift and discharge the same, on that account, as well as the other Circumstances of the Case, to be hereafter mentioned.

1mo, It is perfectly clear that *Innes* and *Clark*, Sir *Patrick Dunbar's* Authors, had an absolutely good and undoubted Right to uplift the Money, and that *Pleids* could, on no Pretence, have excluded them from so doing. The Subject was effectually vested in their Persons for their Security and Payment, and *Pleids* had done all that Law could devise to denude himself: The two several Dispositions granted in their favour, did expressly confer that Power upon them: and, after granting these, it would have been most absurd in him to have pretended to compete with them in levying the Subject, or that he, the Debitor, should, notwithstanding, have been allowed to intromit, and they, the Disponees in Security, be still left to a personal Action against him for their Re-imbursement; it will not therefore bear Argument, that if the Question were with

with *Plaids* himself, he could not have been listened to, in maintaining the Plea set up by the Defender.

And if *Plaids* himself could not have maintained the Plea, the Principle of Law or Justice does not occur, on which Lady *Castlehill*, who pleads in his Right, can be in a better Condition; she is indeed in a worse in every respect: She is not *Plaids*'s Heir or Descendant, but her Claim is founded on the forefaid Back-bonds alone, conveyed by *Plaids* to her Husband, and these Back-bonds, with the Assignment to them, give no Right to the Subject itself, but confer only a Power of calling *Innes* and *Clark* to account in Terms thereof, for the Sums thereby due, that is, for the *Overplus* only, that should remain after clearing the Debts, in Security of which, the two Dispositions were granted in their favour.

The Defender has indeed pretended to have Right to an Adjudication, alledged to have been deduced against *Plaids* in 1711, at the Instance of one *Cumming* of *Logie*, and also to have a Conveyance of all Right in her, from one *Margaret Cuthbert*, calling herself the Daughter and Heir of *Plaids* himself.

But, 1^{mo}, this Adjudication and the Conveyance of it are not produced; and, 2^{do}, if they were, they could have no earthly Influence on the Question; because, as has already been observed, *Plaids* was effectually denuded of the Subject, in favour of *Innes* and *Clark* in 1710, and all that then remained with him, was the simple *Reversion* only, as constituted by the Back-bonds. That therefore, with the Back-bonds themselves, was all which he could convey to another; it was all which he himself pretended to make over to *Castlehill* in 1713, and no more could possibly be carried by the alledged Adjudication, at the Instance of *Cumming* of *Logie*.

The same Observations apply to the forefaid other Right, granted by *Margaret Cuthbert*, the supposed Heir of *Plaids*.

D.

In.

In the first Place, *Margaret Cutbberth*, supposing her to have been a Daughter of *Plains*, does not appear to have had any Title to the Money, or any Right to convey the same, for she was not served Heir to her Father, nor had she made up a Title in any other Manner known to the Petitioners. In the second Place, the Conveyance itself could carry nothing, as *Plains*, the Person whose Heir *Margaret Cutbberth* is pretended to have been, was denuded in 1713 of the very *Reversion* in favour of *Cassibull*, the Defender's Husband. Thirdly, if the Petitioner's Information be true, this Conveyance will appear to your Lordships, in an extremely unfavourable Light, as all the onerous Cause given for it, was no more than a Promise of the pitiful Sum of fifty Pounds *Sterling*, to be paid out of the first and readiest of the Moneys, received from the Publick on sustaining the Claim.

Thus standing the Case, the Rights of Parties are clearly not *super eadem re* : The Petitioners have the principal, paramount, and absolute Right to the *Subject itself*, and the Defender has Right to no more than the *Reversion*, or *Backbonds* : The Medium therefore does not occur on which their Right can be refused to be declared preferable to the Money, or they can be denied Decree, declaring them alone intitled to uplift and discharge it.

Had the Question been with the Earl of *Cromerty* himself, it is, with Submission, indisputable that the Petitioners, on appearing for their Interest, would have been preferred in a Competition ; that would also have been the Case, had Sir *Patrick Dunbar* entered a Claim on the forfeited Estate of *Cromerty* ; and neither Law nor Justice can allow a mere Accident to alter the Situation of Parties, enlarge the Defender's Right, or diminish that of the Pursuer.

It can have no Weight what was pleaded for the Defender, that *Innes* and *Clark* were no more than Trustees, and therefore could not convey to Sir *Patrick Dunbar*.

For,

For, *primo*, Their Right was as broad and extensive, absolute and complete, as any Disposition could possibly make it, and it gives them, in exprefs Words, Power to *dispose*. *Secundo*, That Power is yet more exprefsly reserved to them in the Back-bonds, by which it is provided, that they should not be prejudiced, by granting the same, in the Power of disposing at pleasure. *Tertio*, It is a Mistake to say, that *Innes* and *Clark* were Trustees: They were Disponees, expressly constituted for the very Purpose of uplifting the Money from the Earl of *Cromerty*: They had, before the Dispositions were granted, made large Advances for *Plaids*, to relieve him from Prison, or keep him from starving, and the Dispositions were granted them in *Security* of these Advances, as well as of all others which they should make, for the Purposes mentioned in the Deeds: They were, therefore, *Disponees in Security*, and, as such, had an undoubted Right to uplift the whole Subjects disposed, of which Right they could not be deprived by the Disposer, nor could be impeded by him in uplifting the Subjects, unless he could have *instantly* shewn the whole Debts, in Security of which the Dispositions were made, to have been paid. *Quarto*, It is certain in Fact, that they did advance Sums, now and then, amounting to much more than exhausted this particular Subject, after making Allowance for every supposable Deduction, and as *Innes* and *Clark* were Disponees in Security of Debts, there can be no Doubt that they could convey, not only the Debts themselves, but the whole Subjects standing in their Persons, in Security of these Debts, and that the Assignee would have the same Right to uplift the Subjects, the original Disponee had.

Thus, in a double View, it is out of the Question to enquire, whether *Innes* and *Clark* were Trustees or not, as they have clearly expended more than entitles them to draw every Sixpence of this particular Fund, and your Lordships have Evidence of the Fact, from written Vouchers produced,
of

of Advances and Payments made to the Extent before mentioned.

Thus standing the Case, the Law, Justice, or Equity, which entitle the Defender to hold or draw this Money, in competition with the Petitioners, is not extremely obvious: Her Right is no other than a Conveyance to the *Back-bonds* alone: The Petitioner, on the other hand, a most just and onerous Creditor in every respect, or her Predecessors and Authors, in whose Right she is, did honestly, and *bona fide*, advance out of their own Pockets, on the Faith of the Security granted them by the foresaid two Dispositions over *this particular Subject*, the large Sums, proved by the Vouchers produced; and if the Defender shall be preferred in drawing the Money, the Consequence will plainly be, that she, who has not even so much as a Right *ex facie* to the Subject itself, will draw it without any just Cause, and that the Petitioners, who have, in general, a most onerous Demand, to much more than this Fund, out of the Estate of *Plinds*, with a special and absolute Right to *this particular Subject*, shall be left to a personal Action for recovering it against the Defender. That is directly contrary to the Letter, as well as Spirit of the respective Titles of the Parties, and evidently repugnant to the natural Order in which these suppose the Money ought to come in to their Hands.

The Causes which make the Petitioner anxious to have a Decree instantly pronounced in her favour, without being put to the Trouble of a tedious Count and Reckoning, must be apparent to your Lordships, and are supported by the Circumstances of the Case, as well as by material Justice. The Defender is an *M* Woman, upwards of ninety Years of Age, and the Petitioner is sorry to find her Affairs in an extremely embarrassed Situation: The Consequence, therefore, of her being allowed to touch, or hold the Right of drawing the Money from the Publick, might be extremely bad. The Petitioner

petitioner knows no Diligence by which she can arrest it; she has, indeed, used an Inhibition, but she entertains a great Doubt, whether she can receive any Aid or Security from that Diligence. The Creditors of the Lady *Castlebill* may demand the Money *in her Right*, and should the *jus* be allowed to continue in her, the Petitioner would be left to a personal Action, probably too in a Competition, for recovering it against her or her Heirs, or her Creditors, which might perhaps be rendered ineffectual by her or their Circumstances.

Her Death, too, an Event which cannot be distant, may involve Matters in endless Perplexity, as well as Delay. If the Petitioners were obliged, *in hoc statu*, to go into a Count and Reckoning, that Process would in all Probability be extremely tedious, as the Defender has shown, from the Beginning, the strongest Inclination to protract: Her View, indeed, is perfectly obvious, that Matters may not be ended, before Aids are granted by Parliament for paying the Creditors on the forfeited Estate of *Cromerty*. She allowed a Decree to be pronounced against her in Absence, and by insisting for one Diligence after another, not one of which answered the Purpose for which they were granted, it was near two Years from the Commencement of the Process, before the Petitioner could obtain the first Interlocutor, pronounced on advising the Memorials; and the Manner in which Ingenuity may spin out a Process of Count and Reckoning, is well known. Should the Defender die in the mean time, her Heirs would fall necessarily to be cited, and they, besides not being certainly known, are dispersed over every Corner of the Globe: Or, should the Money come to be paid by the Publick, a Title would be necessary to be made up in their Persons, which would require both much Time and much Expence, and if they once touched it, they might directly transport it to the Countries where they reside.

To these Lordships, Law and Justice will not suffer the Petitioner to be exposed, merely because the Defender happened, by an Accident, to get the Start in entering her Claim. The solid, substantial, and preferable Interest is in the Petitioner; she is willing to reimburse the Defender of the Money *bona fide* laid out on making the Claim effectual against the forfeited Estate of *Cromerty*; and to put an End to every Dispute, she has also offered the best Security, to account for any Overplus that may be found due, in the Event of an accounting.

Frustra petis quod mox es restitutus, the Petitioners admit, is a common Maxim, and could the Defender *instantly* instruct, that the Debts due to the Petitioner were satisfied and paid, or did your Lordships see the least Ground for believing or suspecting the present Fund, or any considerable Part of it, could remain clear for the Defender, there might be something like Justice in applying the Maxim, to support the Defender in her Opposition to the present Demand; but when your Lordships have great Evidence, that the contrary is the Case, find the whole Fund more than exhausted by the Payments made on the Faith of this very Security, and see the Creditors *instantly* instruct, that they have not been reimbursed of a single Penny, Matters must appear in a very different Light.

The Defender has, it is true, made something like a distant Offer of finding Caution on her Part, *if the Lord Ordinary should think it necessary*; but it must immediately occur to your Lordships, that Parties are by no means *in pari casu*, and if they were, that the Petitioner would, on material Justice and common Principles, fall to be preferred, as she has clearly the most substantial as well as most extensive Interest in the Money, and has most Reason to be anxious about it. The Petitioner knows nothing of the Cautioners whom the Lady *Casslehill* can find; but the Petitioner and her Husband are well

well known *both* to be possessed of very considerable Landed-estates in *Scotland* ; they have a fixed Residence and Family settled in this Country, and can always be found with Ease by any that have any Claim upon them ; and they cannot help thinking, that their Offer ought to be preferred, and that your Lordships will think their Demand reasonable.

May it therefore please your Lordships, to alter the foresaid Interlocutors of the Lord Ordinary, and, in respect of the Caution offered, to decern and declare against the Defender, that the Petitioners have the prior and preferable Title to the foresaid Money or Debt, found due out of the forfeited Estate of Cromerty, as well as the only and undoubted Right to uplift and discharge the same ; and, accordingly, to decern the Defender to denude herself of and assign the Decree, sustaining the Claim in her favour upon the said forfeited Estate.

According to Justice, &c.

GEO. WALLACE.

JULY 23. 1766.

A N S W E R S

F O R

Mrs. JEAN HAY, widow of *John Cuthbert* of *Castlehill*, defender ;

T O T H E

PETITION of Mrs. *Elizabeth Dunbar*, and of *James Sinclair* of *Durin*, Esq; her husband, for his interest, pursuers ;

A N D

PETITION of the said Mrs. JEAN HAY.

HUMBLY SHEWETH,

THAT *Alexander Cuthbert*, provost of *Inverness*, obtained, of this date, decreet of apprising against Sir *William Sinclair* of *May* and *Canisby*, apprising from him the several lands therein mentioned ; and, in virtue of charters granted by the bishops of *Murray* and *Ross*, he was afterwards infeft in these lands. He afterwards, of this date, acquired right to another decreet of apprising, which had been obtained against the said Sir *William Sinclair* by *Alexander Dunbar* merchant in *Inverness*, on the 11th February 1664, the very same date with his own. 11th Feb.
1664. 14th March,
1676.

That

18. That provost *Cuthbert* died in the 1681, possessed, not only of these appurtenances, but likewise of the property of several tenements in the town of *Inverness*, and other subjects of considerable value; and he was succeeded in them by his grand nephew *John Cuthbert*, afterwards designed of *Phulke*, who was served heir to him when an infant in 1722.

That Sir *William Sauchair* of *Mer* having become bankrupt, a process was brought before the court of session for the ranking of his creditors, and sale of his estate. The most considerable part of this estate being that situated in the shire of *Ross*, was purchased by *George Viscount of Tarbat*, afterwards Earl of *Granville*, and a small part of this estate, situated in the shire of *Caithness*, was purchased by *William James* writer to the signet, as trustee for *John Sauchair of Ullsher*: And accordingly, of this date, each purchaser obtained a decret of sale in his favours.

2^d July,
1697.

2^d Feb.
1697.

In *February* thereafter a decret of ranking was pronounced in favours of the creditors, by which the heirs of provost *Cuthbert* were preferred on the price of the lands purchased by the Earl of *Granville* for the sum of 5486 *l.* 5 *s.* 8 *d.* *Scots*, and on the price of the lands purchased by *James* for *Sauchair of Ullsher* for the sum of 1075 *l.* 12 *s.* 4 *d.* *Scots*, with interest on both sums from the term of *Whitsunday* 1694. By the same decret the lands of *West Canby*, in the shire of *Caithness*, were adjudged to the heirs of provost *Cuthbert*, in satisfaction of the remainder of the debt, as there had appeared at the sale no purchaser for these lands.

Besides these valuable funds, the said *John Cuthbert* of *Phulke*, as heir to his father and grand uncle, had right to several tenements in the town of *Inverness*, and other subjects of considerable value; and having married *Mrs. Katherine Sutherland*, daughter to the Lord *Dunros*, he acquired right to a bond of provision for 6000 merks, with interest and penalty, granted by Sir *James Dundas* her brother.

It

It was the misfortune of *Cuthbert of Plaidis* to have his affairs much neglected and mismanaged during his minority; and tho' a little attention would have soon put them again in a good situation, yet, being a remarkably weak man, and of a very indolent disposition, his affairs soon became too much embarrassed to be extricated by one possessed of so little abilities as he was.

In order to relieve himself from his difficulties, he made choice of two persons to whom he might commit the management of his affairs, who have since appeared to have been extremely unworthy of that confidence which was reposed in them by this poor gentleman. The two persons were *Alexander Clark* merchant in, and sometime provost of *Inverness*, and *Robert Innes*, designed of *Mondale*, and to them he granted three several dispositions of all his funds, for the purpose of settling his affairs and paying his debts.

The first of these dispositions, which is dated the 15th of August 1709, assigns to the said *Alexander Clark* and *Robert Innes*, and constitutes them his trustees for uplifting all debts and sums of money, whether heritable or moveable, due to him by the Earl of *Cromarty*, Sir *James Sinclair* of *May*, and the tenants of *Canisby*, and also the 6000 merks contained in the bond granted by Sir *James Dunbar*. 15th Aug.
1709.

By the second disposition, dated the 21st of October the same year, he conveyed to them the two apprisings already mentioned, together with the lands of *Canisby* which had been adjudged to him, and the 6000 merks due by Sir *James Dunbar*'s bond. 21st Oct.
1709.

This disposition, however, having been considered as too general, a third was, of this date, executed; by which, after reciting the two former dispositions, he conveyed to the said *Alexander Clark* and *Robert Innes*, and their heirs and assignies, the said two apprisings, the decreet of ranking and sale, the sums and lands which are adjudged to him 30th Jan.
1710.

him by that decret: and this disposition contains procu-
ratory of resignation and precept of sale, together with
an assignation to the mails and duties for bygones and in
time coming.

John Cuthbert had never been intert in these subjects,
and therefore the trustees obtained from him a bond of
the same date with this last disposition, for 50,000 merks;
and having thereupon charged him to enter heir in special
to his grand uncle, they, of this date, obtained adjudica-
tion of the whole subjects and lands conveyed by the fore-
said dispositions, together with his burgage tenements in
the town of *Inverness*.

20th Jan.
1710.

29th June,
1710.

Of even date with each of these three dispositions, a
backbond was granted to *John Cuthbert* by *Robert Innes* and
Alexander Clark, declaring these dispositions to be trust
rights, granted to them for security of what sums they ei-
ther had already, or should afterwards advance for the
granter, together with the interest thereof; after deduction
of which they obliged themselves to become accountable
for the remainder to the said *John Cuthbert*, his heirs and
assigns, in whose favours they also obliged themselves to
demede.

Soon after having obtained these dispositions, the tru-
stees entered into the possession and management of all the
subjects thus conveyed to them; and they, at the same
time, took care to possess themselves of every paper that
belonged to Mr. *Cuthbert*. For three or four years, it
would appear that they supported *Plaid* and paid several
of his debts: But they soon thereafter forgot their duty,
allowed this poor gentleman almost to starve, and grossly
squandered and misapplied his funds, without paying any
of his creditors.

This unfortunate situation of *Plaid*, and this misma-
nagement of his trustees, were regreted by his friends, and
much complained of by his creditors. At last *John Cuth-*
bert

bert of *Castlehill*, a very near relation, and a considerable creditor of *Plaids*, resolved to take some measures for securing the debts due to himself, and, if possible, also to retrieve the affairs of his friend.

Castlehill, besides considerable debts, immediately due to himself, had further acquired right to an adjudication obtained against *Plaids*, of this date, by *Hugh Robertson* apothecary burghers of *Inverness*, and conveyed by him to *Castlehill* on the 3d of May 1698. 24th June,
1692.

He accordingly, of this date, obtained from *Plaids* a conveyance of the whole of these subjects, which had been before conveyed to *Innes* and *Clark*, and to the several back-bonds granted by them, "with full power to ask, crave and obtain just compt, reckoning and payment of the said *Robert Innes* and Mr. *Alexander Clark*, their intromission by virtue of the said disposition, in the terms of the said back-bonds, and if need bee's, to pursue therefor in his own name or mine, and to hinder and impede any agreements with any of my debtors, that may be made by them unfrugally, or to loss, &c." 17th July,
1713.

Of the same date with this conveyance, *Castlehill* granted a back-bond to *Plaids*, declaring the conveyance to be in security of the debts therein particularly mentioned, due to him by *Plaids*, amounting at that time in capital sums, to 5000 *l. Scots*, and obliging himself to account for his intromissions after deduction of these debts: And the back-bond concludes with this clause; "But prejudice all ways to me on the said grounds of debt resting my said father and me, or of any other right, to seek for the sums thereby due, as accords."

Castlehill afterwards became further creditor to the said *Cuthbert* of *Plaids*, by assignation, of this date, to a decret of adjudication obtained by *Alexander Cuming* of *Logie*, against the said *John Cuthbert*, for the accumulate sum of 3106 *l. 10 s. 4 d. Scots*, dated the 20th June 1711; and 23d Dec.
1714.

10 by assignment, of this date, to an adjudication obtained
 17 against *Phaul*, by *George Gunning* merchant in *London*,
 dated the 3^d January 1762.

About the year 1719, the affairs of *Alexander Clark* fell
 into great disorder; and nearly about the same time, *Innes*
 also failed in his circumstances.

In that year *Clark* having got himself confirmed execu-
 tor to one Mr. *Robert Fraser*, he prevailed upon *Patrick*
Dunbar of *Bozermadlan*, afterwards Sir *Patrick Dunbar* of
North Mole, to become cautioner for him in the confirmati-
 on. At the same time, for Sir *Patrick's* security, *Clark*, by
 Aug 9 a deed, of this date, conveyed to him all right which he
 17 9 had to the various funds disposed to him and *Innes* by
Cuthbert of *Phauls*: and particularly, among others, the
 funds of *Gmisby*, of which he assigns the rents from *Whit-*
funday 1719.

As this right, however, was incomplete as to one half,
 without a conveyance from *Innes* or his heirs, Sir *Patrick*
Dunbar endeavoured to supply this defect in the best man-
 ner he was able. He discovered, upon examining some of the
 transactions of *Clark* and *Innes*, in executing their trust, that
Clark singly had paid up some of the bonds in which they had
 been jointly bound on *Phauls's* account. He therefore imme-
 diately concluded *Clark* to have been creditor to *Innes* in these
 sums, merely because, from two or three bonds which ac-
 cidentally occurred, it appeared that *Clark* had paid more
 than his own share. Without examining any farther, Sir
Patrick obtained himself deemed executor creditor to *In-*
nes by the commissary of *Moray*: and thereafter, obtain-
 ed a decret of constitution *regulatoris causæ*, against *Jon-*
athan Innes, the son and apparent heir of *Abundale*. Sir *Patrick*
 himself proceeded no further: but after his death in 1763,
 his daughter, the present party, as having right by vir-
 tue of a general disposition from her father, of date 17th
December 1753, confirmed the sums in the aforesaid de-
 creet

creet *cognitionis causa*; and thereupon, of this date, obtained an adjudication against him, for the accumulate sum of 8808 l. Scots, of *Innes* of *Mondale's* half of the whole subjects, which he and *Clark* had acquired from *Plaids*. It is only farther to be remarked, that this decret of adjudication, not only contains all those subjects which had been conveyed by *Plaids* to *Innes* and *Clark* by the three trust dispositions already mentioned; but farther contains the burgage tenements in *Inverness*, which had been adjudged from *Plaids* by *Innes* and *Clark*, upon the trust-bond for 50,000 merks, already mentioned.

June 20.
1764.

The respondent has thus endeavoured to explain to your Lordships the titles upon which the present pursuer has thought proper to found her claim; and she shall now proceed to state these titles upon which her claim is founded, and upon which she has rested her defence against the present action.

The respondent has already mentioned, that her husband, *John Cuthbert* of *Castlehill*, was a considerable creditor of *Cuthbert* of *Plaids*; had acquired right to several adjudications deduced against *Plaids*, and had obtained from him a conveyance to the back-bonds of *Clark* and *Innes*, and to all those subjects which had been formerly disposed to them.

Clark and *Innes* had greatly abused the trust committed to them; and there was great reason to believe, that in the very first four years of their possession of the funds conveyed to them by *Plaids*, they had been fully indemnified for every shilling which they had advanced for him. Accordingly *Castlehill*, in the year 1732, brought processes against *Innes* and *Clark* and the Earl of *Cromarty*, and likewise against Sir *Patrick Dunbar*, who had by this time obtained possession of all the papers belonging to *Plaids*, and likewise of the lands of *West-Canisby*. *Castlehill's* death, however, which happened in April 1733, put a stop to the

the process, and nothing material appears to have been done.

In *October* 1732, a submission was entered into, with regard to their several claims, between Sir *Patrick Dunbar* and *Cuthbert's* son, *George Cuthbert*; but it does not appear, that in consequence of this submission any thing more was done, than Sir *Patrick's* producing an account of the sums advanced for *Plaid* by *Innes* and *Clark*, and objections being offered to that account by Mr. *Cuthbert*.

John Cuthbert of *Cuthbert*, the respondent's husband, Dec 22. 1729. had, of this date, executed in her favours a general disposition to all his subjects heritable or moveable; in the *first* place, for payment and security of her own jointure; *2dly*, for the purpose of paying his debts; and *lastly*, of the provisions to his children.

The respondent, in order to complete her right to these July 3. 1744. subjects, obtained, of this date, a decret of adjudication in implement against her husband's heir, adjudging from him the several subjects and lands of which her husband's estate consisted, and in particular, the lands of *West-Canisby*, and the sums for which *Plaid* was ranked by the decreets of ranking and sale of the estate of *Sanchar* of *May*.

In the 1749, *George* Earl of *Cromarty* having been attainted and convicted of high-treason, the defender, in the month of *July* that year, within the time prescribed by act of parliament, entered a claim for herself and her children upon the forfeited estate of *Cromarty*, for payment of the sum of 5486 *l. 5 s. 8 d. Scots*, for which, by the decret of ranking in the 1695, the heirs of Provost *Cuthbert* had been ranked upon the estate purchased by the Earl of *Cromarty*.

In discussing this claim, it was moved as an objection on the part of the crown, that the claimant had not produced the original grounds of her claim. To remove this objection, the respondent obtained a diligence against Sir *Patrick Dunbar* and his agents, for recovering the papers necessary

necessary for supporting her claim, and which had been put into his hands by *Innes* and *Clark*: And accordingly these papers were exhibited upon oath, by *Sir Patrick's* agent, in the clerk's hands.

About the same time, the respondent acquired from *Margaret Cuttbert*, only daughter and heir of *John Cuttbert* of *Plaids*, a disposition to all lands, heritages, and other rights, which had belonged to her father, and particularly, his claim on the estate of *May*; together with a ratification of all rights granted by her father to *Cuttbert* of *Castlehill*, the respondent's husband.

After a very tedious and expensive litigation with the crown, the respondent prevailed, and had her claim sustained by the unanimous judgment of your Lordships, on the 29th of *July* 1762.

After all this had past, and after *Sir Patrick Dunbar*, seemingly conscious of the defect of his right, had thus suffered the respondent, after so long a litigation, to prevail in her claim, she did not expect to have been now drawn into a new litigation with regard to this matter. Notwithstanding, however, the present pursuer, as heir to *Sir Patrick Dunbar*, has thought proper, upon the conveyance by *Plaids* to *Innes* and *Clark*, and upon the conveyance of their right to *Sir Patrick* her father, to commence a process against the present respondent and the Officers of state, in order to have it found and declared, that she has the preferable right to the debt upon the estate of *Cromarty*, for which the respondent's claim had been sustained by your Lordships; and that the respondent should be obliged to denude in her favours of that claim, and the decret sustaining it.

In support of this demand, the pursuer thought proper to alledge, that *Innes* and *Clark* had advanced very large sums of money for *Plaids*, which, together with the interest thereon, amounted in the 1764 to the sum of

C

30,000 l.

July 29.
1762.

32, *per I. Smith*: and, to prove this allegation, they produced an account, together with some of its vouchers.

This cause came to the tourte of the rolls, before the Lord George Smith Ordinary, in *July 1764*, when the respondent's agent being excluded by *Sequestra*, and the Petitioner a good woman, unable to give the necessary information, decret was allowed to go against her in silence. Having afterwards been reopened against this decret, and the cause having come to be debated in *November 1764*, the respondent offered many material objections to the account which had been produced by the pursuer, of the sums advanced for *Plaid* by *James* and *Clark*; and in particular, she observed, that in that account there was not credit given for a single shilling of the intromissions of the trustees with the effects of *Plaid*. The Lord Ordinary accordingly, Nov. 24.
1764. by an interlocutor of this date, " ordained the pursuer, against next calling, to give in an account of her author's intromissions with the effects of *John Cathbert*; " and granted warrant for letters of incident diligence, at " Mrs. *John Hay*'s instance, for recovering any writings " which belonged to the said *John Cathbert*, or may be " necessary for instructing her defence."

Instead of complying with this appointment of the Lord Ordinary, the pursuer thought proper, in *January 1765*, to produce a confederence containing a very general and unsatisfying account of the intromissions of Sir *Patrick Dunbar*, and *Clark* and *James*. Answers were made to this confederence; but the pursuer anxiously endeavoured to avoid carrying into this count and reckoning with the respondent, and insisted, that she should, in the *first* place, denude in their favours of her claim upon the estate of *Granville*.

After some litigation before the Lord Ordinary, his Dec. 1^o.
1765. Lordship was pleased, of this date, to pronounce the following

lowing interlocutor: " Having considered the above debate, mutual memorials, and hail process, finds, That the defender, in virtue of her titles founded upon, and particularly, in virtue of the decreet sustaining her claim, is vested in the right and property of the debt upon the forfeited estate of *Cremarty*: Finds that the pursuer is not intitled to insist, that the defender shall denude of said debt in her favour, excepting in so far as the said pursuer shall instruct distress, or payment of the debt; for the relief of which, Sir *Patrick Dunbar* got a conveyance from *Clark*: Finds, That the pursuer cannot found upon the right of *Innes*, excepting in so far as the shall instruct that *Innes* was a creditor to *Plais*, by advances made under the trust conveyance to him and *Clark*; and in so far as the said pursuer shall also instruct, that she is a just and lawful creditor to *Innes*; and allows her to give in an account of charge and discharge accordingly."

The respondent had pleaded, that it was necessary for the pursuer in this action, to prove what sums Sir *Patrick Dunbar* had been obliged to advance as cautioner for *Alexander Clark*, and for relief of which he had obtained the conveyance from *Clark*. It was the more necessary to insist in this, that the respondent had the greatest reason to believe, that Sir *Patrick* had been much more than fully indemnified for all the sums advanced by him upon *Clark's* account, by his intromissions with the estate and effects of *Clark* at his death.

Against the whole of the Lord Ordinary's interlocutor, the pursuers offered a representation; and his Lordship, of this date, pronounced the following interlocutor: " Having considered the representation with answers, and again reviewed the former proceedings, adheres to the former interlocutor, in so far as it finds, that the defender, in virtue of her title founded upon, and particularly, in virtue of the decreet sustaining her

" claim,

Feb. 11.
1766.

" claim, is vested in the right and property of the debt
 " upon the forfeited estate of *Commons*; but varies the sub-
 " sequent part of the interlocutor, and finds, that the
 " conveyance of this debt granted by *Phelps*, was only a
 " right in security for the moneys truly advanced, or to be
 " advanced by *James* and *Clark* for *Phelps*' behoof, and was
 " a trust as to the residue or reversion; which trust *James*
 " and *Clark* could not transfer to Sir *Patrick Dunbar*;
 " Finds that the pursuer is intitled to insist, that the de-
 " fender shall demure in her favour, in so far as the said
 " pursuer shall instruct *James* and *Clark* were creditors to
 " *Phelps*; and that she is not obliged to instruct to what
 " extent Sir *Patrick Dunbar* was creditor to *James* and *Clark*,
 " his authors; and ordains her to give in an accompt of
 " charge and discharge thereof accordingly."

Ag. until this interlocutor representations were offered,
 both on the part of the pursuer and defender; both which
 his Lordship was, of this date, pleased to refuse. Against
 these interlocutors, the pursuer has presented a petition;
 which your Lordships having, of this date, appointed to
 be answered, the following answers are humbly offered on
 the part of the defender.

June 27.
1782

July 9th
1782

The respondent shall, in the *first* place, endeavour to satisfy your Lordships, that upon various grounds she has acquired to complete a right to the debts now in question, affecting the estate of *Commons*, as cannot possibly be challenged; and that she cannot be obliged to demure in favour of the pursuer, even in so far as the pursuer shall instruct, that *James* and *Clark* were creditors to *Cuthbert* of *Phelps*. She shall, in the *second* place, endeavour to show, that she cannot, at least, be obliged to demure, till the pursuer shall have instructed, how far *James* and *Clark* were creditors to *Phelps*. And she shall, in the *third* place, shew to your Lordships, that there is the strongest presumptive evidence of *Clark* and *James* having been long ago paid of all that they
 had

had advanced upon account of *Plaids*, by their intromissions with his effects.

In examining their several rights to the debts in question, the respondent apprehends that she has a clear and preferable right, in virtue of the two apprisings obtained against *Plaids*, long before the trust disposition granted by him to *Clark* and *Innes*, and expressly carrying from him the two apprisings against the estate of *Sinclair of May*.

These two adjudications are, *first*, That obtained by *Hugh Robertson* apothecary burghers of *Inverness*, of date the 24th of *June* 1692, and conveyed by him to *Cuthbert of Castlehill*, on the 3d of *May* 1698; and the other, that obtained by *George Cumming* merchant in *Inverness*, of date the 8th of *January* 1692, and conveyed likewise to *Cuthbert of Castlehill*, on the 19th of *January* 1721.

By these two apprisings, which have come by progress into the person of the respondent, she humbly apprehends, that she has a right clearly preferable to that of the purchaser, founded upon the disposition to *Clark* and *Innes*, in the 1710. Upon this foundation, as well as upon her other titles already mentioned, the respondent prosecuted her claim upon the forfeited estate of *Cromarty*, and prevailed in it by an unanimous judgment of your Lordships in 1762.

It will particularly be observed, that *Cuthbert of Castlehill*, by accepting the conveyance from *Plaids* in 1713, did by no means renounce the right which he had in consequence of these apprisings, but, on the contrary, by an express clause in his backbond to *Plaids*, expressly reserved it. The clause is, " But prejudice always to me on the said grounds of debt resting my said father and me, or of any other right, to seek for the sums thereby due, as accords."

The respondent has likewise acquired right to another adjudication obtained against *Plaids* by *Alexander Cumming*
D of

of *Izzie*, dated the 20th of *June* 1711, and conveyed to *Cuthbert of Castlehill* 23d *December* 1714. With respect to this, however, the pursuer has argued, that as it was posterior to the trust disposition in 1710, so it could carry no more than the right of reversion, which was all that remained at that time in the person of *Plaid*.

The respondent does, however, apprehend, that this adjudication obtained by a lawful creditor must be preferred, and that no private trust disposition, granted by a debtor in embarrassed circumstances, such as *Plaid* was, can possibly prejudice the legal diligence of other creditors, whose grounds of debt were anterior to that trust disposition. It will possibly be answered by the pursuer, that the must be preferable, by the adjudication obtained by *Clark* and *Innes*, on the 29th *June* 1714, upon the trust bond for 57,000 marks. But your Lordships will remark, that this adjudication can have no effect in prejudice of the adjudication of *Cunning* of *Izzie*, because it entirely proceeds upon the foundation of the trust disposition already mentioned; and, at any rate, these adjudications must come in *pari passu*, as being within year and day of each other.

Whatever may be in this objection, it cannot possibly be urged against the other two appraisings now founded upon, which were many years prior to that trust disposition.

But in the *second* place, Even laying aside these adjudications, the respondent apprehends, that by the conveyance from *Plaid* to *Castlehill* in the 1713, she has a preferable right to that of the pursuer. In this conveyance, *Plaid* disposed to *Castlehill* all those subjects which he had formerly conveyed to *Innes* and *Clark*, and likewise their back-bonds obliging themselves to account and to denude. This was clearly an assignation to these subjects; and tho' posterior to the assignation to *Clark* and *Innes*, must however be undoubtedly preferred, if it shall be found to have been first completed by intimation. This, however,

however, the respondent apprehends to have been the case, and that she completed her assignation to those subjects, by entering her claim upon the forfeited estate of *Cromarty*, before the assignation upon which the pursuer claims had been completed in any proper manner. Entering her claim was certainly equivalent to a regular intimation, and was then indeed the only possible method by which she could complete her assignation: The pursuer has indeed produced an instrument of intimation, made of this date, February 1. 1720. to the Earl of *Cromarty* by Sir *Patrick Dunbar*; but your Lordships will be informed, that this was of no consequence, as there is great reason to believe, that inhibition had been used by *Cuthbert* of *Castlehill* against *Clark* and *Innes*, prior to the date of the assignation to Sir *Patrick Dunbar* by *Clark*. And besides, the respondent shall by and by have occasion to show your Lordships, that Sir *Patrick Dunbar* has no right whatever to *Innes's* share of the effects of *Cuthbert* of *Plaids*; and therefore, that undoubtedly the respondent's having completed her assignation, by entering her claim, must make her preferable with respect to *Innes's* share, which the intimation of Sir *Patrick Dunbar*, the assignee of *Clark*, could not possibly affect.

The respondent must beg leave, in the *third* place, humbly to maintain, That the right of the pursuers to the debts in question, is entirely cut off, by their not having entered their claim within the time limited by the vesting act. By this statute it is expressly appointed, That every person and persons, pretending to have right or title to, or claim upon, any estate forfeited to the crown, " Shall, within the space of three months, to be reckoned from and after the date of the entry that shall be made in the register-book in the exchequer, of any personal estate; and in case of real estates, within six months of the entry of the register, to be kept in the county or stewartry where such estate lies, in manner herein before directed, of the estate or interest in, to or out of which such claims or demands are

20 Geo. II.
cap. 41. §
22.

" to

“ to be made respectively, enter all their respective claims
 “ and demands before the court of session in *Sections*, in
 “ such manner as is herein after mentioned ; or in default
 “ thereof, every such estate, right, title, interest, use, pos-
 “ session, reversion, remainder, annuity, service,
 “ rent, debt, charge, or incumbrance in, to, out of, or up-
 “ on the said premises, or any part thereof, shall be, and
 “ is hereby declared to be null and void, to all intents and
 “ purposes whatsoever ; and the estate or estates so, as a-
 “ fore said, liable unto, or charged therewith, shall from
 “ thence be freed, acquitted, and discharged of and from
 “ the same.”

Your Lordships will observe, that the present respon-
 dent did, within the time appointed by the statute, en-
 ter her claim, while Sir *Patrick Dunbar* produced indeed
 papers to support the claim of the respondent, but ne-
 glected altogether any claim which might have been
 competent to himself. The respondent, therefore, humbly
 apprehends, that by this neglect, which cannot be suppo-
 sed to have proceeded from ignorance, the pursuer lost al-
 together any right or claim which he might pretend to
 have to the debts now in question, and that his claim has
 therefore now become, according to the words of the sta-
 tute just quoted, *null and void to all intents and purposes
 whatsoever*.

It is particularly to be observed, that when *Plaid* af-
 signed these subjects to *Cuthbert of Castlehill*, which
 he had formerly conveyed to *James* and *Clark*, together
 with their back-bonds, there was the greatest reason to
 believe, that *James* and *Clark* had been even then fully in-
 demnified for any sum advanced by them, on account of
Plaid. It will be further remarked that *Cuthbert* was a
 creditor to a very considerable extent of *Cuthbert of Plaid*,
 and was therefore most undoubtedly an onerous assignee.
 In this view of the matter, the respondent most
 humbly contend, that as she, an onerous assignee, has
 entered

entered her claim, and has had it sustained, she cannot now be either obliged to denude or to repeat the money, if she had once received it, *quia repetitio nulla est ab eo qui suum recepit*. She apprehends that the Earl of Cromarty, if he had paid her, could not possibly insist in a *condictio indebiti* against her ; because she is an onerous assigney of the original creditor : And she apprehends, that much less can the present pursuer insist in her present claim.

The respondent has thus endeavoured, upon various grounds, to satisfy your Lordships, that her right to the debts in question, affecting the estate of *Cromarty*, is preferable to the right of the pursuer ; and that the pursuer cannot oblige her to denude, even altho' it should be instructed, that *Innes* and *Clark* were creditors to *Plaids*. If, however, your Lordships shall not sustain these defences against the claim of the pursuers, she shall, in the next place, endeavour to show, that she is vested in the right and property of the debt upon the forfeited estate of *Cromarty*, in virtue of her various titles already explained, and particularly, in virtue of the decreet sustaining her claim ; and that therefore she cannot be obliged to denude, excepting in so far as the pursuers shall instruct that *Innes* and *Clark* were creditors to *Plaids*.

To obtain the power of uplifting this debt, is the chief aim of the pursuer ; and the respondent apprehends, that your Lordships will easily perceive the true reason of the pursuer's anxiety in this matter. It cannot possibly be the respondent's old age, or the uncertainty of discovering her heirs, which are the pretended reasons offered for the pursuer, as the respondent has offered unexceptionable caution ; but the pursuer knows well that *Innes* and *Clark* were long since paid of all their advances ; and that therefore it will be impossible to instruct them to have been creditors of *Plaids*.

The respondent apprehends, that by the decret sustaining her claim, she is so much vested in the right and property of that debt, that it can be uplifted by no other person than herself. She apprehends, that it would be competent to the crown, to refuse payment of this debt to any other than the person whose claim has been sustained by a decret of the court of session: and therefore, that she cannot be obliged to denude, however competent it may be for the pursuer to insist against her, in order to repeat, in so far as it shall be instructed that *Innes* and *Clark* were creditors to *Plaids*.

But there appears, farther, another reason, why the defender cannot be obliged to denude and assign to the pursuer the right of uplifting the debts due to her upon the forfeited estate of *Cromarty*. *Innes* and *Clark* were trustees, and *Plaids* had committed to them the management of his whole affairs, and the power of uplifting the debts due to him. This however was a personal privilege, which the respondent humbly apprehends they could not possibly convey to *Sir Patrick Dunbar*. In so far as they were truly creditors to *Plaids*, they had a right to be indemnified, and this they could undoubtedly convey; but as to the residue or reversion, they were only trustees, and the *jus exigendi*, the personal privilege of uplifting the debts due to *Plaids*, their constituent, they could not transmit to any other person whatever. It is upon this footing, the respondent apprehends, that the Lord Ordinary has repeatedly found, “ That the conveyance of
“ this debt, granted by *Plaids* to *Innes* and *Clark*, was on-
“ ly a right in security for the sums truly advanced or to
“ be advanced by *Innes* and *Clark* for *Plaids*’s behoof, and
“ was a trust as to the residue or reversion; which trust *Innes*
“ and *Clark* could not transfer to *Sir Patrick Dunbar* ”

And the respondent hopes, that your Lordships will the more readily be of this opinion, as she shall now endeavour to shew, from various circumstances, that there is the
greatest

greatest reason to believe that *Innes* and *Clark* never advanced any considerable sums for *Plaids*, and that, for what they did advance, they were very long since paid by their intromissions with his effects.

The pursuer has, thro' the whole of her petition, endeavoured to make your Lordships believe, that *Innes* and *Clark* had, from motives of compassion, generously accepted of the management of the affairs of Mr. *Cuthbert* of *Plaids*, and, in order to relieve him, had advanced very large sums of money. Your Lordships, however, will be informed that this was by no means the case. *Plaids*, a very weak man, was rashly induced to intrust the settlement of his affairs, and the management of his effects to these gentlemen, so little worthy of this confidence reposed in them. They had been but a short while in possession when they squandered away his effects, allowed the poor gentleman himself to live in the utmost poverty and distress; and, in short, their mismanagement became so notorious, that it long remained almost a proverb throughout that part of the country. They took no measures whatever for paying his creditors; and in proof of this, your Lordships will observe, that *Castlehill*, in order to secure himself, was obliged to get a conveyance from *Plaids* in the 1713; that he afterwards obtained right, in the 1714, to an adjudication of *Cuming* of *Logie*, whose debt, therefore, likewise remained unpaid; that, in 1721, he acquired right to the adjudication obtained against *Plaids* by *George Cuming* merchant in *Inverness*, which was therefore a debt remaining also unpaid; and besides these, your Lordships will perceive the adjudication of another creditor, likewise remaining unpaid, and that is, the adjudication obtained by *Hugh Robertson* apothecary burghs of *Inverness*. Your Lordships, therefore, will from all this perceive, that *Innes* and *Clark* do not appear to have been taking any measures towards the payment of the creditors of *Plaids*, and the execution of the trust committed

committed to them. *Plaids* himself became at last so sensible of their mismanagement, that in his conveyance to *Cuthbert* of *Cuthbert*, he gives him power, "to hinder and "impede any agreements with any of my debtors that "may be made by them, (i. e. *Clark* and *Innes*) unfrugally or to loss."

The pursuer has produced an account of the sums advanced for *Plaids* by *Innes* and *Clark*, by which the would make it appear, that the sum owing them amounts at present to no less than 33.176 *l.* 5 *s.* 6 *d.* *Scts.* Your Lordships will, however, remark, that even if we should admit the account to be altogether unexceptionable; the whole principal sums pretended to have been advanced, amount only to 9557 *l.* 16 *s.* 6 *d.* *Scts.* The respondent must, however, observe, that this account is in many particulars false, and not supported by any vouchers whatever; and it will be particularly remarked, that in the whole account, there is not credit given for a single shilling of their intromissions with the effects of *Plaids*. To satisfy your Lordships, however, that these intromissions have long since paid every farthing advanced for *Plaids* by *Clark* and *Innes*, it will be only necessary to mention the various funds belonging to *Plaids*, the possession of which *Clark* and *Innes* obtained.

In the first place, there was conveyed to them 1571 *l.* 12 *s.* 4 *d.* *Scts.*, with interest from *Whitsunday* 1694, for which *Plaids* was preferred on that part of the estate of *May* purchased by *William Innes* for *Sinclair* of *Uthyer*; and which sum, it can be intrusted, was uplifted by *Innes* and *Clark* at *Martins* 1710, as there can be produced dispositions granted by them, of date the 6th and 24th of *November* that year, conveying that debt to *Sinclair* of *Uthyer*.

2^{dly}, There was conveyed to them a bond of provision granted by Sir *James Dunbar* for the sum of 6000 merks, with

with many years interest due upon it ; payment of which, there is pretty good reason to presume, was recovered by *Innes* and *Clark*.

3dly, There was conveyed to them the possession of the lands of *Canisby*, together with an assignation to the rents for by-gones, and in time coming. It is admitted, that *Clark* conveyed these lands to Sir *Patrick Dunbar* in the 1719 ; and that Sir *Patrick* and the pursuer have continued in the possession of them ever since. But farther, the pursuer, it is apprehended, must give credit for the rents of that estate from the 1694, as, by the trust disposition in 1710, *Clark* and *Innes* had got assignation to the mails and duties for by-gones, and in time coming. The pursuer has endeavoured to represent these lands as of little value ; but, according to the respondent's information, their yearly rent is upwards of 50 *l. Sterling* ; and therefore, their very intromissions with these rents, if periodically applied, will go nearly to extinguish every shilling which they pretend to have advanced on account of *Plaids*.

4thly, *Clark* and *Innes* adjudged from *Plaids*, in the 1710, several burgage tenements belonging to him in the town of *Inverness*, which had not been conveyed to them by the trust-disposition. There is the strongest reason to presume that they not only obtained possession of these tenements, but that they likewise sold some of them ; as in the accompt produced by the pursuer, there is an article stated of an accompt of debursments by *Innes*, as his expences in going to *Inverness* to sell the houses belonging to *Plaids*.

The respondent, if it were necessary at present, could mention many other circumstances, from which there would appear the greatest reason to presume, that *Innes* and *Clark* were long ago indemnified for every shilling they had advanced, by their intromissions with the effects of *Plaids*,

and it could likewise be shown, that the account produced for the pursuer is false, and erroneous in many different respects. This, however, she apprehends to be unnecessary, as she hopes your Lordships will find, that upon the titles already explained, she has a right to the debts affecting the foreited estate of *Greyfriars*, clearly preferable to the right of the pursuer, and that at any rate, she shall not be obliged to assign her right, excepting so far as the pursuer shall clearly instruct that *Imes* and *Clark* were creditors to *Plaids*.

The defender humbly apprehends, that she has thus made satisfying answers to the petition of the pursuer; and that she has farther shown, that upon the various grounds already explained, her right is preferable to that of the pursuer; and that she cannot be obliged to denude, even in so far as it shall be proved, that *Imes* and *Clark* were creditors to *Plaids*. In case, however, your Lordships shall not sustain these general defences, she hopes, at least, that your Lordships will adhere to the interlocutors of the Lord Ordinary, in so far as he has found, that she cannot be obliged to denude, except to the extent that *Imes* and *Clark* shall prove themselves to have been creditors to *Plaids*. She must now crave your Lordships review of one part of the Lord Ordinary's interlocutor, by which he has found, that the defender is obliged to denude, in so far as the pursuer shall instruct, that *Imes* was creditor to *Plaids*.

July 5. 1766. Against that part of the Lord Ordinary's interlocutor, the defender offered a representation, which his Lordship was, of this date, pleased to refuse. Against this interlocutor, the defender offered a second representation; but July 19. 1766. his Lordship, on the 19th instant, was pleased to refuse it, and to adhere to his former interlocutors.

The defender humbly apprehends, that altho' the pursuer should be intitled, as the assignee of *Clark*, to insist that

that she should denude of her right to the debts affecting the forfeited estate of *Cromarty*, in so far as it shall be proved, that *Clark* himself was creditor to *Plaids*; yet that she cannot be obliged to denude, in so far as *Innes* was creditor, as the pursuer has not produced any sufficient right from *Innes* to his share of the subjects acquired from *Plaids*. In these answers, the defender has already explained the manner in which *Sir Patrick Dunbar* endeavoured to supply the defect of his title to *Innes's* share, after he had obtained the assignation from *Clark*. Because it appeared that *Clark* himself had paid up some of the bonds, in which he and *Innes* had been jointly bound upon account of *Plaids*, *Sir Patrick* immediately concluded *Clark* to have been creditor to *Innes*; and therefore, obtained himself confirmed executor-creditor to *Innes* by the commissary of *Murray*. He afterwards obtained a decret of constitution *cognitionis causa*, against *Jonathan Innes*, the son and apparent heir of *Robert Innes* of *Mondall*; and the present pursuer having confirmed the sums in that decret *cognitionis causa*, as executrix to her father, has endeavoured to complete a right, by obtaining an adjudication against the said *Jonathan Innes*, for the accumulate sum of 88c8 l. *Scots* of *Innes* of *Mondall's* half of the whole subjects which he and *Clark* had acquired from *Plaids*.

Your Lordships will observe several material defects in this title which the pursuer has endeavoured to rear up to *Innes's* share of these subjects, and which she has in vain endeavoured to obviate.

It will be, in the *first* place, observed, that the whole proceeds upon the supposition that *Clark* was a creditor to *Innes*, of which, however, there is not the least evidence produced. It does indeed appear, that *Clark* had paid up some bonds, in which he and *Innes* had been jointly bound upon the account of *Plaids*; but it cannot surely from thence be certainly concluded, that *Clark* was
creditor

...the defender humbly apprehends, that unless the contrary be proved, it must be presumed, that *Clark*, the trustee, paid them out of the effects in his hands belonging to *Patrick* his constituent; and this the more especially, as *Clark* alone had all along possession of the lands of *Cambr.*

But farther, even if the pursuers should be able to show, that *Clark* was truly creditor to *Innes*, yet, the defender apprehends, that the pursuer, in consequence of that, could have no claim against *Innes*, unless she could produce some assignation from *Clark*, to the debts due to him by *Innes*. No conveyance or assignation from *Clark* to these debts has been produced by the pursuer; and therefore, it is apprehended, that the right of the pursuer to *Innes*'s share is altogether defective and insufficient. The pursuer has, indeed, asserted, that Sir *Patrick Dunbar* obtained from *Clark* an assignation to his claims against *Innes*; and, in proof of this, has produced an instrument of intimation made by Sir *Patrick* to the Earl of *Granary*, upon the 1st of *February* 1720, of his disposition from *Clark*. Your Lordships will, however, observe, that the assignation itself is not produced; and that this intimation which is brought as evidence of it, does, on the contrary, tend to show, that the assignation founded upon was only to *Clark*'s share of the effects of *Patrick*. To show this, the defender shall quote to your Lordships the words of the intimation itself, which are as follows: " Thereafter the said *Patrick Dunbar* also exhibited assignation granted by the said Mr. *Alexander Clark* for the onerous causes therein specified, assigned, and disposed, to and in favours of the said *Patrick Dunbar*, his heirs and assigns, the one half of the principal sums, annual rents, and penalties, contained in the whole bonds and securities granted by the said Provost *Clark* and Robert *Innes* of *Mindoll*, conjunctly and severally, for the debts

“ debts due by the said *John Cuthbert*, and which are already retired, discharged, and assigned to the said Provost *Clark*, or which are paid by him, and not assigned, as is fully narrated in the said assignation, dated the said 21st day of *October* last.”

From this, the defender apprehends, it will appear, that the assignation founded upon, was only to *Clark's* share of these lands, and that it seems clearly to imply, that he had no right to convey any more than his own share of them.

The defender therefore hopes, that your Lordships will be satisfied that the pursuer has produced no sufficient title to *Innes's* share of the effects of *Plaids*; and therefore, that if you shall not sustain her general defences against the present action, that you will at least find, that she can be obliged to denude, only in so far as the pursuers shall instruct *Clark* to have been a creditor of *Plaids*.

May it therefore please your Lordships, to find, 1mo, That in respect of the title founded upon by the defender, she has the preferable right to the debts in question, affecting the forfeited estate of Cromarty. 2do, To find, that the pursuer having neglected to enter her claim within the time prescribed by act of parliament, has lost all right or claim whatever to the foresaid debts. Or, 3tio, To find, that at least the defender cannot be obliged to denude, any farther than the pursuer shall instruct that her authors were creditors to Cuthbert of Plaids. And, 4to, To alter the interlocutor of the Lord Ordinary, which finds the pursuer's title to Robert Innes's share of the effects of Plaids, sufficient to entitle her to insist

in the present action against the defender; and therefore, at any rate, to find, that the pursuer can only oblige the defender to denude, in so far as she shall prove Alexander Clark to have been a creditor of Plaids.

According to justice, &c.

ROBERT CULLEN.

SEPTEMBER 27, - 1766.

A N S W E R S

F O R

Mrs. *Elizabeth Dunbar*, lawful Daughter of, and general Disponee and Executrix confirmed to, the deceased Sir *Patrick Dunbar* of *Northfield*, Baronet, and of *James Sinclair* of *Durin*, Esq; her Husband, for his Interest;

T O T H E

PETITION of Mrs. *Jean Hay*, Widow of *John Cuthbert* of *Castlehill*.

MRS. *Elizabeth Dunbar*, in the Right of Sir *Patrick Dunbar* her Father, brought an Action into this Court, against Mrs. *Jean Hay*, Widow of *John Cuthbert* of *Castlehill*, concluding, to have it found and declared, that the Pursuer had the prior and preferable Right and Title to the Sum of 5154 *l.* 15 *s.* 10 *d.* and 331 *l.* 9 *s.* 2 *d.* with the Interest thereof from the Term of *Whitsunday* 1694, due by *George* late Earl of *Cromerty*, as representing *George* Viscount of *Tarbat*, his Grandfather, which Sums were sustained, as Debts affecting the forfeited Estate of *Cromerty*, upon a Claim entered by the said Mrs. *Jean Hay*, and therefore concluding, that the said Mrs. *Jean Hay* should be decerned to denude, in favours of the Pursuers, of the fore-said Claim, and Decreet sustaining the same.

A

In

Dec. 18,
1755.

In this Action the Lord *Gardenston*, Ordinary, pronounced the following Interlocutor : “ The Lord Ordinary having considered the above Debate, mutual Memorials, and hail Process, finds, That the Defender, in virtue of her Titles founded upon, and, particularly, in virtue of the Decreet sustaining her Claim, is vested in the Right and Property of the Debt, upon the forfeited Estate of *Cromerty* : Finds, That the Pursuer is not intitled to insist, that the Defender shall denude of said Debt in her favour, excepting in so far as the said Pursuer shall instruct Distress, or Payment of the Debt, for Relief of which Sir *Patrick Dunbar* got a Conveyance from *Clark* : Finds, That the Pursuer cannot found upon the Right of *Innes*, excepting in so far as she shall instruct, that *Innes* was a Creditor to *Plaidis*, by Advances made under the Trust-conveyance to him and *Clark*, and in so far as the said Pursuer shall also instruct, that she is a just and lawful Creditor to *Innes* : and allows her to give in an Account of Charge and Discharge accordingly.”

Feb. 11,
1756.

The Pursuers represented against this Interlocutor ; and the Lord Ordinary, upon advising the same with Answers, of this Date, pronounced the following Interlocutor : “ Having considered this Representation with Answers, and again reviewed the former Proceedings, adheres to the former Interlocutor, in so far as it finds, that the Defender, in virtue of her Titles founded upon, and, particularly, in virtue of the Decree sustaining her Claim, is vested in the Right and Property of the Debt upon the forfeited Estate of *Cromerty* ; but varies the subsequent Part of the Interlocutor, and finds, That the Conveyance of this Debt granted by *Plaidis* to *Innes* and *Clark*, was only a Right in Security, for the Sums truly advanced or to be advanced by *Innes* and *Clark*, for *Plaidis*’s Behoof, and was a Trust, as to the Residue, in Reversion, which Trust *Innes* and *Clark* could not transfer to Sir *Patrick Dunbar* : Finds, That the Pursuer is intitled to insist, that the Defender shall de-

“ nude

“ nude in her favours, in so far as the said Pursuer shall instruct, that *Innes* and *Clark* were Creditors to *Plaids*, but that she is not obliged to instruct to what Extent *Sir Patrick Dunbar* was Creditor to *Innes* and *Clark*, his Authors, and ordains her to give in an account of Charge and Discharge accordingly.”

Against this Interlocutor a Representation was preferred on behalf of the Pursuer, setting forth, That she, from the Beginning of the Process, had produced an Account, with the Vouchers of the Debts paid by *Innes* and *Clark* for *Plaids*, as also had defended upon the Intromissions which her Author *Sir Patrick* had with the Rents of the Lands of *West Canniesbie* conveyed to him, being a small Farm of inconsiderable Value: That the Defender, after all her Endeavours, had brought no Evidence of any farther Intromissions; and as the Rents of the foresaid Mailing intromitted with as above, and the Value of the Mailing itself, together with the Debt in question affecting the Estate of *Cromerty*, were not equal to the Sum of the Debts paid by *Innes* and *Clark* for *Plaids*, as contained in the Account and Vouchers thereof in Process. Therefore they prayed the Lord Ordinary to find, that the Pursuers, who have a prior and preferable Title to the Debt in question, and have offered to find Caution to account for any Overplus, which shall in the Event appear to remain after paying the Debts due to them, are directly entitled to uplift and discharge the same, and that the Defender should instantly be decerned to denude in their favours, in terms of the Libel.

Answers were put in to this Representation, containing a Counter-representation, praying the Lord Ordinary to find, that the Defender is not obliged to denude, even in so far as the Pursuers shall instruct that *Clark* was Creditor to *Plaids*, in respect that the Defender had vested the Debt in her Person, in consequence of the Disposition from *Plaids* to her Husband, and the Decree of the Court of Session sustaining her

her Claim, and that neither *Clark* nor Sir *Patrick Dunbar* had done any thing to compleat the Conveyance by *Plaids* to *Innes* and *Clark*; at any rate, to find that the Pursuers cannot found upon *Innes's* Right, and to adhere to the Interlocutor of the 18th *December* 1765, finding that the Defender can only be obliged to denude, in so far as it can be instructed that *Clark* was Creditor to *Plaids*.—And the Lord Ordinary, of this Date, pronounced the following Interlocutor: “ Having considered this Representation, and Answers for the Defender, and Answers thereto for the Pursuer, refuses the Desire of both Representations, and adheres to the former Interlocutors.”

June 29,
1766.

Representation

Against the foresaid Interlocutors the Pursuers preferred a Petition to your Lordships, praying your Lordships to find, that they have the prior and preferable Title to the foresaid Debt affecting the forfeited Estate of *Cromerty*, and to decern the Defender to denude herself of, and assign the Decree sustaining the Claim, in favours of the Pursuers, upon their finding Caution to repay to the Defender whatever Balance may be found in their Hands, after paying the Debts due by *Plaids* to *Innes* and *Clark*.

The Defender, on the other hand, preferred a Representation to the Lord Ordinary, praying his Lordship to find, “ That the Defender is not obliged to denude, even in so far as the Pursuer shall instruct that *Clark* was Creditor to *Plaids*, provided the Defender shall make Payment to the Pursuer of any Balance that may remain due to her in the Right of *Clark*; and, at any rate, to find, that the Pursuer cannot found upon *Innes's* Right, and that the Defender is neither obliged to denude in favours of the Pursuer, in so far as *Innes* was Creditor to *Plaids*, nor bound to make Payment of any Balance, if any should have been due to *Innes*, in respect the Pursuers have no Right to his Interest in *Plaids's* Subjects.” But this Representation the Lord Ordinary refused without Answers; and the Defender having preferred

July 5,
1766.

preferred a second Representation, containing precisely the same Prayer with the former. It was likewise refused without Answers.

July 22,
1766.

The Pursuers Petition having been ordained to be seen and answered, Answers were put in, containing a Counter-petition for the Defender, which has likewise been ordained to be seen and answered, and, in obedience to which, these Answers are humbly offered on behalf of the Pursuers.

In answering the Defender's Petition, the Pursuers shall not trouble your Lordships with a State of the Facts which gave rise to the Question betwixt the Parties, as the same are very fully stated in the Pursuers Petition, which will fall to be advised by your Lordships at the same Time with these Answers.

The Defender, in her Answers and Counter-petition, endeavours to maintain, *1mo*, That she has the preferable Right to the Debts in question, affecting the forfeited Estate of *Cromerty*. *2do*, That at least she cannot be obliged to denude any further than the Pursuers shall instruct, that their Authors were Creditors to *Cuthbert of Plaids*. And, *lastly*, That the Pursuers cannot found upon *Innes's* Right, and, that therefore, they at any rate can only oblige the Defender to denude, in so far as they shall prove *Alexander Clark* to have been a Creditor of *Plaids*.

The Defender, in the first Place, founds her Preference upon certain Adjudications, alledged to have been led against the Estate of *Cuthbert of Plaids*, and which afterwards came into the Person of *Castlehill*, particularly, *1mo*, An Adjudication led against *Plaids* upon the 20th *June* 1711, at the Instance of *Alexander Cumming* of *Logie*. *2do*, An Adjudication in the 1692, at the Instance of *Hugh Robertson*; and a third likewise, in the 1692, at the Instance of *George Cumming*.

With respect to the first of these Adjudications, it cannot avail the Defender, for two Reasons, *1mo*, That neither the
B Adjudication,

Adjudication, nor the Grounds of it, nor the alledged Conveyance thereof to *Castlehill*, are produced. And, 2^{do}, As by the Defender's own showing, it was led after *Plaids* was denuded of the Subject in question, in favours of *Innes* and *Clark*, it could only carry Right to the Back-bonds, which were granted by *Innes* and *Clark* to *Plaids*.

Neither is there any Ground in Law, upon which *Cumming* of *Logie* could reduce the Disposition granted by *Plaids* to *Innes* and *Clark*; in the first Place, there is nothing produced to show, that *Logie* was Creditor to *Plaids*, and still less, that he was a Creditor *anterior* to the Date of the Disposition. 2^{do}, *Plaids* was not Bankrupt in Terms of the Statute 1696; yea, although he was in embaralled Circumstances, it does not even appear, that he was then insolvent; and, therefore, although he had been an *anterior* Creditor, there was no Grounds for reducing a Disposition, granted in security of Money advanced by *Innes* and *Clark* to *Plaids*, or for his Be-
hoof.

As to the other two Adjudications, which have been mentioned for the first Time in this Counter-petition, neither they, nor the Grounds thereof, nor the Conveyances thereof to *Castlehill*, are produced, and if any such ever existed, of which the Pursuers are entirely ignorant, they have Reason to believe, that they were only acquired by *Castlehill*, for the Purpose of strengthening his Title to the Burrow Tenements in *Inverness*, which belonged to *Plaids*, and of which *Castlehill* had got the Possession. Yea, they have Reason to believe, that if such Adjudications existed, they did not even comprehend the Subjects now in question; for when the Defender entered her Claim upon the forfeited Estate of *Cromerty*, it was founded solely upon the Back-bonds, granted by *Innes* and *Clark* to *Plaids*, and *Plaids*'s Assignment thereto in favours of *Castlehill*, but none of the foresaid Adjudications were either produced, or founded upon in that Claim.

The

The Defender says in the second Place, that, independent of these Adjudications, her Right is preferable, because the Conveyance from *Plaids* to *Castlehill* in the 1713, though *posterior* in Date to the Conveyance to *Innes* and *Clark*, was duly intimated by the Claim, that was entered upon the forfeited Estate of *Cromerty*, before which Time there had been no proper Intimation of *Innes* and *Clark's* Right.

But this Argument is founded upon two capital Mistakes: For, in order to maintain the Proposition, it is necessary to suppose, that the Conveyance by *Plaids* to *Castlehill*, was a second Disposition of the Subjects, antecedently disposed to *Innes* and *Clark*; whereas it is clear, that the titles of the contending parties are not *super eadem re*; *Clark* and *Innes* had a Right to the foresaid Subjects, in Security and Payment of the Debts due to them by *Plaids*; whereas the Conveyance by *Plaids* to *Castlehill* is only a simple Assignment to the Back-bonds granted by *Innes* and *Clark* to *Plaids*; it recites the Dispositions granted by *Plaids* to *Innes* and *Clark*, and their Back-bonds to him, and subsumes, that *Castlehill* had at that Date delivered to *Plaids* a certain Sum of Money, for making that Assignment; and therefore, he assigns and disposes, to and in favours of *Castlehill*, the said Back-bonds granted by *Innes* and *Clark*, haill Heads, Tenor and Contents thereof, &c.

Castlehill therefore by this Assignment, was in no better Case than his Cedent, *John Cuthbert* of *Plaids*,—the Debt in question was vested in the Persons of *Innes* and *Clark*, by an antecedent Disposition in their favours;—they were only by their Back-bond obliged to count and reckon for their Intromissions, after paying themselves; so that, supposing the Conveyance to *Castlehill* had been first completed in his Person by Intimation, Infeftment, &c. prior to the Completion of the Right in the Persons of *Innes* and *Clark*, yet still he would not have been intitled to compete with *Innes* and *Clark*, because no more was truly conveyed to him, than the
Right

Right of Reversion that was competent to *Plaid's*, after Payment of the Debts due to *Innes* and *Clark*.

But, *2do*, The Defender is likewise in a Mistake, in supposing, that *Clark* and *Innes*, or Sir *Patrick Dunbar*, did nothing in consequence of *Plaid's* Disposition to *Innes* and *Clark*. The Fact is, that the same was not only intimated to the Earl of *Cromerty*, the Debtor, but a Petition was likewise presented by *Innes* and *Clark* to the Court of Session, some short Time after the Conveyance by *Plaid's* to them, for having the Earl's Bond, granted for the Price of the Estate of *Mei*, registrated; but this Petition was refused upon Answers, as the Earl alledged he had Counter-claims against *Plaid's*, sufficient to cut down the Debt. This Petition and Deliverance thereon, was recovered out of Sir *Patrick Dunbar's* Hands, and used by this Defender as a Document of Interruption of Prescription, which was objected on behalf of the Crown against the Claim which the Defender entered upon the forfeited Estate of *Cromerty*.

Clark and *Innes* thereafter made several Attempts to settle the Matter amicably with the Earl, and actually entered into a Submission with him, which they were authorised to do by their Back-bond. But this Submission came to nothing; and it even appears, that *Innes* and *Clark* attempted a Reduction of the Earl's Counter-claims against *Plaid's*, to pave the Way for their recovering the present Claim.

On the other hand, although the Conveyance by *Plaid's* to *Castlehill* is dated as far back as the 1713, yet he never intimated his Assignment, either to Lord *Cromerty*, the Debtor, or to *Innes* and *Clark*, nor was any Step whatever taken by him in consequence of his Right, till the Year 1732, long after *Plaid's* Death. This Taciturnity, upon the Part of *Castlehill*, must satisfy your Lordships of the Idea which *Castlehill* entertained of his own Right, and that he was sensible, that the Right of *Innes* and *Clark* was not only preferable to *Innes*, but that the Sums in which they stood Creditors

tors to *Plaids*, would fully exhaust the Subject, and, of consequence, that he could draw nothing in virtue of his Right to the Reversion.

The Defender says, That he has Reason to believe, that Inhibition had been used by *Castlehill* against *Clark* and *Innes*, prior to the Date of the Assignment by *Clark* to Sir *Patrick Dunbar*. But of this Fact there is not the smallest Evidence; and it is improper to talk of *Belief*, when, if the Fact was so, it could be known with Certainty from the Records; and, indeed, except the foresaid Back-bonds to *Plaids*, *Castlehill* had no Claim against *Clark* and *Innes*, upon which to use Inhibition.

The Defender, in the next Place, alledges, That any Preference or Claim, which the Pursuers might otherwise have had upon the Subjects in question, is cut off by the Vesting-act.

But, with all Submission, it is inconceivable, how the Vesting-act can have the least Influence upon the Question in dispute. The Certification in the Vesting-act does only operate in favours of the Crown; it was intended to spite every Claim against the Crown, that was not entered within the Time appointed by the Statute. The Claim, that is the Subject of the present Controversy, has been sustained against the Crown; and it is certainly *jus tertii* to the Crown, whether the Money shall be paid to the Defender or to the Pursuers.

If the Claim has been kept alive against the Crown, it will still be competent to any third Party having a preferable Right, to declare and ascertain that Right against the Claimant.—If a Claim has been entered and sustained, in the Name of a putative Heir, it would not hinder the true Heir to declare his Right, and he could oblige the putative Heir to account for the Contents of the Claim, if he had received Payment from the Crown; or, if the Subjects were still *in medio*, he would be found intitled to draw preferably to the putative

tative Heir.—In short, where a Claim has been sustained against a forfeited Estate, at the Instance of a Person having an Interest in a Subject, it will by no Means give an indefeasible Right to the Claimant, in competition with any third Party, who can show, he has a preferable Right to the Subject.—Every Person having an Interest in the Subject, are left to settle their Preferences at Common Law, and the Statute has no Concern in the Matter; and accordingly, many Instances did occur, after the Rebellion 1745, where Claims were entered in the Name of one Person, and where third Parties having produced, during the dependence of the Claim, a preferable Right, the Decree was allowed to go out in their Name.

It was said for the Defender, that *Castlehill* was Creditor to *Plaids* to a considerable Extent, and was therefore a most onerous Assignee, and on that account, she cannot be obliged, either to denude or repeat the Money, if she had received it, *quia repetitio nulla est ab eo qui suum recipit, licet ab alio quam vero debitor.*

The Pursuers apprehend, that it will be very unnecessary for them, to enter into the Question, whether, or how far, the Defender's Author was an onerous Assignee from *Plaids*? They apprehend, with all Submission, that the Principle of Law here appealed to, is most grossly misapplied: For, in the *first place*, The Defender hath not as yet recovered Payment, but the Money is *in medio*. *2do*, The Meaning of the Law is, that where a Person, who is truly Creditor in any Claim, recovers his Payment from a Person who believed himself Debtor in the Claim, but who truly was not, is not bound to repeat the Money so paid; whereas, in the present Case, the Crown is unquestionably the true Debtor: And the sole Question would be, if the Defender had truly recovered the Money, whether she would be intitled to hold it, against a Person who had a prior and preferable Right to the Debt?—The Pursuers apprehend, that nothing is more clear, than that the Defender would

would not be intitled to maintain this Plea against the Pursuers, whose Right is preferable, the more especially, that when the Grounds of Debt were recovered out of the Hands of Sir *Patrick Dunbar*, upon a Diligence at the Defender's Instance, in support of the Claim which she had entered upon the Estate of *Cromerty*, the Lord Ordinary, when he ordered the Production to be made, expressly reserved to Sir *Patrick* all Right and Title which he had to the Subject then claimed by the Defender.

But, further, the Pursuers humbly apprehend, that the Preference now insisted for by the Defender is not now entire, it being adjudged by an Interlocutor of the Lord Ordinary, now become final, that the Pursuers are preferable to the Defender, in so far as they and their Authors were Creditors to *Plaids*. This Point was insisted upon by the Defender, and was over-ruled by an Interlocutor of the Lord Ordinary, upon the 11th *February* 1766, which finds, "That the Pursuer is intitled to insist, that the Defender shall denude in her favour, in so far as the said Pursuer shall instruct *Innes* and *Clark* were Creditors to *Plaids*." The Defender represented against the foresaid Interlocutor, upon this and some other Points thereby determined; but, upon advising the same, with Answers, the Lord Ordinary adhered; ^{June 20,} whereupon the Defender preferred another Representation to ^{1766.} the Lord Ordinary, in which the foresaid Point was departed from, and she only prayed the Lord Ordinary to find, "That the Defender is not obliged to denude, even in so far as the Pursuers shall instruct, that *Clark* was Creditor to *Plaids*, provided the Defender shall make Payment to the Pursuer of any Balance that may remain due to her in Right of *Clark*." And this Representation having been refused, another Representation was preferred, containing the precise same Prayer with the former, but which was likewise refused; and therefore, as the Point now in controversy was determined against the Defender, by an Interlocutor of the 20th *June* 1766, and
was

was not thereafter represented against, that Interlocutor is become final, and cannot be brought under the Review of the Court by a Petition, which was presented no earlier than 23d July 1766.

But the Defender contends, That although her Right was not preferable to that of the Pursuer, that yet the Pursuers are not intitled to insist in the Right of *Innes*, but that they can only oblige the Defenders to denude, in so far as she shall prove *Alexander Clark* to have been a Creditor of *Plaids*, in respect the Pursuers have no Right to found upon *Innes's* Interest in the Subjects conveyed to him and *Clark* by *Plaids*; for that no Conveyance from *Innes* to Sir *Patrick Dunbar*, or even from *Innes* to *Clark* is produced: That it does not appear that *Clark* was a Creditor to *Innes*, for that although *Clark* paid up some Bonds, in which he and *Innes* had been jointly bound, upon the Account of *Plaids*, yet it must be presumed, that the same were paid by *Clark*, as Trustee, out of the Effects in his Hands, belonging to *Plaids* his Constituent. And, 2do, It is said for the Defender, that although *Clark* was truly Creditor to *Innes*, yet the Pursuer, in consequence thereof, could have no Claim against *Innes*, unless they could produce a Right from *Clark* to the Debts due to him by *Innes*, whereas no such Right is produced.

This Question is no doubt still entire. The Defender is not concluded in this Point as in the former, it having been kept open by the two Representations above mentioned. At the same time the Pursuers are humbly confident, that your Lordships will be of opinion, that the Lord Ordinary's Interlocutor upon this Point is well founded.

The Pursuers Title to *Innes's* Share stands thus: *Clark* and *Innes* having become jointly bound to several of *Plaids's* Creditors, and *Clark* having paid the Debts in which they were so bound, got Assignations thereto, whereby he became Creditor to *Innes* for his Half.

In the Transaction betwixt Sir *Patrick Dunbar* and *Clark*, *Clark* granted to Sir *Patrick* a Disposition, in so far as he, *Clark*, was interested in *Plaids's* Subjects; and, in order to affect *Innes's* Share, *Clark*, of the same Date, granted an Assignment to Sir *Patrick* of the Half of the Debts which he, *Clark*, had paid for *Innes*.

Upon the Title of this Assignment, Sir *Patrick* brought an Action before the Court of Session against *Innes's* Son and Heir, as charged to enter Heir to his Father, for Payment of the several Debts assigned; and, the Heir having renoun-
Nov. 14, 1783.
ced, Sir *Patrick*, of this Date, obtained Decreet *cognitionis causa*; and the Pursuers having thereafter confirmed the Sums in this Decreet, as Executors-testamentors to Sir *Patrick*, they thereupon obtained Decreet of Adjudication of *Innes's* Share of the Subjects, assigned by *Plaids* to *Clark* and him.

This is the Pursuers Title to *Innes's* Share, and which, in a Question with this Defender, they apprehend to be unexceptionable, the foresaid Decreet of Cognition and Adjudication being produced.

It is indeed true, that neither the Grounds of the Adjudication, nor the Assignment by *Clark* to Sir *Patrick*, are in Process. The Grounds of the Adjudication, if necessary, can be produced; but, as to the Assignment, which was left in the Hands of *Ludovick Brodie*, Sir *Patrick's* Doer, the same has not been seen since his Death, owing to the Confusion in which his Papers appear to have been left; but that the same did exist, is proved by most satisfying Evidence.

In the *first* Place, it appears, from an Instrument of Intimation to the Earl of *Cromerty* of this Assignment, and of the other Conveyance from *Clark* to Sir *Patrick*, made upon the 1st of *February* 1720, little more than two Months after it was granted; and in which Instrument it was said, that the said Assignment was exhibited, and read to the Earl.

2do, The Assignment and Grounds of Debt assigned, appear to have been produced in a Submission betwixt Sir *Patrick*, as in the full Right of *Innes* and *Clark*, and *Castlehill*,

in which Submission, the whole Debts paid by *Imes* and *Robertson*, were claimed by Sir *Patrick*, as having Right thereto. The Evidence of this Production is an Inventory of the Writs, with a scored Receipt thereon for the same, dated 10th *December* 1733, by *George Tod*, who acted as Clerk to the Submission, subjoined to which, there is a Note, in Mr. *Tod*'s Hand-writing, mentioning, that the Writs in the Inventory, were, on the 26th *December* 1733, returned to Mr. *Brodie*, who had given them to Mr. *Tod*, as Clerk to the Submission.—The Assignment is the 13th Article of this Inventory, and is there said to have been dated 21st *October* 1719, and intimated to *Mondole* himself 27th of that Month.

3th, Before these Papers were produced in the Submission, they appear from the foresaid Inventory, to have been given up by Mr. *Brodie* to Sir *Patrick*; and accordingly, there is a scored Receipt for the same by Sir *Patrick* to Mr. *Brodie*, upon said Inventory, dated 10th *August* 1733; and upon the 29th of said Month, Sir *Patrick* having been decerned Executor-creditor to *Imes* before the Commissary of *Moray*, the same, with the Assignment thereof, appears from the Extract of the Decreet-dative in Process, in which they are all recited to have been produced before the Commissary.

And, *Lastly*, the Grounds of Debt, and Assignment thereof, having been returned by Sir *Patrick* to Mr. *Brodie*, his Receipt for the same upon the foresaid Inventory was scored, and they afterwards appear to have been produced in the Process of Constitution against *Mondole*'s Heir, as the Decreet of Cognition obtained in that Process, expressly bears the Production of them.

From these Writings, sufficient Evidence arises of the Existence of the Assignment; they would be sufficient in a proving of the Tenor; and as this Assignment is only founded on, incidentally in the present Question, your Lordships will not put the Pursuer to the Trouble and Expence of the Circuit of a formal proving of the Tenor.

This

This, with Submission, is a sufficient Answer to the Objection stated in the Petition, that Sir *Patrick* had no Right from *Clark* to his Claims against *Innes*. The Objection is founded upon the Supposition, that Sir *Patrick* had no other Right to these Debts, than the Disposition which *Clark* granted to Sir *Patrick*, of *Clark's* Share of *Plaids's* Subjects; whereas the Assignment now founded upon, and the Disposition of *Clark's* own Share, are two distinct Deeds, though of the same Date; and accordingly, the Instrument of Intimation in Process, bears the Production of both Deeds.

But, *2do*, the Pursuers humbly apprehend, that there is no Necessity to produce either the Assignment or Grounds of the Decreet of Cognition and Adjudication, but that the DECREETS of Cognition and Adjudication which are produced, are of themselves a sufficient Title in this Question.

The Defender does not pretend to derive Right from *Innes*, or any claiming under him; and therefore, she has no Title to found upon any Objection, which could only be competent to *Innes*, or those in his Right.—It has been already found by an Interlocutor of the Lord Ordinary, that the Pursuers are not obliged to instruct, to what Extent they are Creditors to *Innes* and *Clark*. The Defender has acquiesced in the Interlocutor, in so far as concerns *Clark*; and as *Clark* and *Innes* do in this Point stand precisely upon the same Ground,—the Decreet of Adjudication, which is obtained at the Pursuer's own Instance, is a legal Assignment to *Innes's* Share, and as effectual as the voluntary Assignment from *Clark* to his Share.—The Defender has no Title to challenge this Adjudication, or set it aside, any more than he has to set aside the Disposition from *Clark*, which has been found effectual in the Question with the Defender, to carry *Clark's* full Share, without any Regard to the Extent of the Debts, which might be due by *Clark* to Sir *Patrick*.—The Right to challenge the Adjudication in question, is only competent

to those deriving Right from *Innes* or his Heirs, and consequently *jus tertii* to the Defender.

This is similar to what occurs every Day in Actions of Mails and Duties, that are brought upon Decrees of Adjudication.—As the Possessor of the Lands, who himself pretends no Right of Property in them, has neither Title nor Interest to challenge the Adjudication, as the Adjudger is not bound to enter into any Count and Reckoning with the Tenants of the Lands, so the Adjudger is under no Necessity to produce either the Grounds or Warrants of the Adjudication, the simple Decree of Adjudication is, of itself, a sufficient Title to carry on the Action.

In like manner, as the Defender pretends no Right from *Innes*, as she has no Claim to any Part of *Innes's* Share, as therefore it is precisely the same thing to the Defender, whether the Right remained with *Innes* and his Heirs, or belongs to their Assignee, so the Pursuers are not bound to enter into any Count and Reckoning with respect to their Claims against *Innes*, and, consequently, there is no necessity to produce the Warrants of the Adjudication.—The simple Decree of Adjudication, is, of itself, a sufficient Title in the present Action, whereas not only the Adjudication, but likewise the Decree of Cognition are in this Case produced; so that, upon the whole, on this Head, the Pursuers can have no Doubt that your Lordships will, in this Case, adhere to the Lord Ordinary's Interlocutor, in so far as it finds, that the Pursuers are intitled to insist, in so far as both *Innes* and *Clark* were Creditors to *Plaids*, without any regard to the Extent of the Claims which Sir *Patrick Dunbar* had against either *Innes* or *Clark*.

The only other Point in the Petition is, Whether or not the Defender can be obliged to denude, any farther than the Pursuers shall instruct, that their Authors were Creditors to *Cuthbert* of *Plaids*, which can only be known by the Event of a Count and Reckoning betwixt the Parties?

This

This Point was given against the Pursuers by the Lord Ordinary, and is the Subject of the Petition which was preferred to your Lordships on behalf of the Pursuers, and which Point they shall therefore humbly submit to your Lordships, upon what is said in the Petition.

The Pursuers shall only observe in the general, that as it is an adjudged Point, and which is now become final, that the Pursuers are preferable to the Defender, in so far as their Authors were Creditors to *Plaids*, and that the Defender, in the Right of the Back-bonds granted by *Innes* and *Clark* to *Plaids*, has only a Right to call them to account for what of the Subjects shall remain, after Payment of the Debts due to them by *Plaids*. It is, with Submission, not quite so obvious, by what Rule this Defender can be allowed to draw the Money from the Publick, and that the Pursuers must be laid under the Necessity of instituting an Action against the Defender, for Payment of the Debts due by *Plaids* to *Innes* and *Clark*, which Action must resolve into a Count and Reckoning, in which, from the Conduct of the Defender in this Action, the Pursuers have Reason to expect, that they will meet with every Rub that can be thrown in the Way, whereby the Action may be kept in Dependence for Years.

If Sir *Patrick Dunbar* had himself entered the Claim upon the Estate of *Cromerty*, in due Time, the whole Debt would have been sustained in his favours, and he would have been allowed to draw the whole Money from the Publick, leaving it to the Defender to call him to account.

It has been already shown, that the Claim's having been entered in this Defender's Name, cannot alter or affect the Rights of those having an Interest in the Claim. It is, in some Sense, improper to consider this Action, as a Claim against the Defender to denude ; for, as her own Titles go no further than a Right to call the Pursuers to account, no more is thereby vested in the Defender's Person ; but, as the whole Debt has been sustained upon the Estate of *Cromerty*, in con-

sequence of the Claim that was entered by the Defender, so this Action is more properly a Declarator, the Tendency of which is to have it found and declared, that the Pursuer is the Person who is intitled to draw the Money.

The whole of the Grounds of Debt, that were the Foundation of the Defender's Claim, had been delivered over by *Plaids* to *Innes* and *Clark*, along with the Disposition in their favours, and they afterwards came into the Possession of Sir *Patrick Dunbar*, who came to be in their Right.—Sir *Patrick Dunbar* was certainly intitled to hold the whole Grounds of Debt against this Defender and all the World, until he was satisfied of the Money due by *Plaids* to *Innes* and *Clark*.—It was not in the Power of this Defender, or any other Person, to force them out of his Hands upon any other Terms, and therefore, when they were produced in Court by Sir *Patrick Dunbar*, in support of the Claim that was entered by the Defender, he did not thereby mean to transfer the Possession to this Defender, and so to put himself in *petitorio*, in procuring an Account from the Defender.—On the contrary, by the Lord Ordinary's Interlocutor, there is reserved to Sir *Patrick* all Right and Title which he had to the Subject then claimed, and so the Grounds of Debt could only be understood as produced by him in support of the Claim, and, primarily, for supporting his own Interest in it.

The Defender, no doubt, with a view to conciliate Favour to her Claim, and to create Prejudices against the Pursuers Authors, is pleased to say, that *Plaids* had been grossly abused and imposed upon by *Innes* and *Clark*; that he had made choice of these two Persons as Trustees, in order to extricate his Affairs, and to relieve him of the Difficulties in which he was engaged, but that they grossly abused the Trust reposed in them; that they allowed him to starve, and paid off few or none of his Debts; that, accordingly, very few of the Articles now claimed are vouched, and that, at the same time, they entered into the Possession and Management of all the

the Subjects conveyed to them, and took care to possess themselves of every Paper that belonged to *Plaids*; that the Extent of their Intromissions was so great, that, by the first four Years of their Possession, they were fully indemnified for every Shilling which they had advanced for *Plaids*; and sundry Subjects are condescended upon by the Defender, of which she alledges the Pursuers Authors had assumed the Possession; and that, in order to relieve *Plaids* from his unfortunate Situation, and the Mismanagement of his Trustees, *Castlehill*, the Defender's Husband, procured the forefaid Conveyance from *Plaids*.

These Allegations are strong, and carry along with them a Charge of a very deep Dye against the Pursuers Authors; but, at the same time, they are thrown out, not only without Evidence, but directly contrary to Evidence, and which the Defender herself must, in a great measure, know to be false.

That *Innes* and *Clark* advanced large Sums to *Plaids*, cannot be doubted of; there are clear Vouchers in Process, for Sums advanced to him, and on his Account, which, at this Day, amount to betwixt 30 and 40,000 *l. Scots*.

And, with respect to the Intromissions had by the Pursuers Authors, it is denied, that they ever had any Intromission with any of *Plaids's* Subjects, the Lands of *Canniesbie* only excepted. The Defender, in the Course of this Action, was allowed Diligence after Diligence for recovering Evidence of their Intromissions; but, after all, she has not been able to show, that they intromitted with the Value of one Shilling of *Plaids's* Funds, other than the Lands of *Canniesbie*; and, indeed, the Defender must herself be satisfied, that this is the Fact. The only Subjects that were conveyed to *Innes* and *Clark*, were these Lands, and the Debt due by the Earl of *Cromerty*, the last of which is still unpaid, and is the Subject of the present Controversy.

The

The first Subject condescended upon by the Defender, as having been intromitted with by *Innes* and *Clark*, is the Sum of 1071 *l. Scots*, said to have been received from *Ullyster* as *Plaids*'s Share of the Price of *Mey* sold to *William Innes*; but after the Defender has been allowed a Diligence for recovering Evidence of the Intromissions of *Innes* and *Clark*, and as there is not the Vestige of Evidence produced, that they had any Intromission with this Sum, it is amazing the Defender should take the liberty still to persist in this Averment.—The Pursuers must, at the same time, observe, that although the Fact were true, yet that Sum, the Value of the Lands of *Canniesbie*, and the bygone Rents thereof, when joined to the Sum now in question, that was sustained against the Estate of *Cromerty*, will not exhaust the Debts due by *Plaids* to *Innes* and *Clark*, for which clear Vouchers are produced.

The second Fund condescended upon, as intromitted with by *Innes* and *Clark*, is a Bond of Provision for 6000 Merks, granted by Sir *James Dunbar*, with many Years Interest due upon it.

But this is an absolute Fiction; there is no Evidence that such Bond was ever delivered to *Innes* and *Clark*, or even that it ever existed.

The next Subject condescended upon, is the Lands of *Canniesbie*.—The Pursuers do admit, that *Clark* conveyed these Lands to Sir *Patrick Dunbar* in the 1719, and that Sir *Patrick* and the Pursuers have continued in the Possession of them ever since; but the Pursuers do aver, that the Defender is greatly mistaken as to the Value of them, when she says they are upwards of 50 *l. Sterling* yearly; the free Rent of these Lands does not exceed 300 Merks, even although the Heritor had Right to the Tiends, concerning which a Process is presently depending in Court.

The fourth and last Article, are certain Tenements in *Inverness*, which, it is said, were sold by *Clark* and *Innes*.

But

But this is likewise without the least Foundation; none of these Tenements were conveyed by *Plaids* to *Innes* and *Clark*, which makes it at least probable that *Plaids* was not in Possession of them.—They were indeed included in the Adjudication which was led by *Innes* and *Clark* upon the Trust-bond, in order to challenge *Castlehill's* Title to them.—According to the Defender's own Showing, *Castlehill* had prior Adjudications affecting them, which made it impossible for *Innes* and *Clark* either to acquire the Possession from him, or sell them, in consequence of the Trust-adjudication in their Person. And indeed it is amazing, that the Defender should take the liberty to make such Averments, when she herself must know, that these Tenements were all along possessed by her own Husband, and made Part of his Estate, which was adjudged by his Creditors, and is now under Sequestration before your Lordships.

As therefore it appears that *Innes* and *Clark* had advanced large Sums of Money to *Plaids*, and for his Behoof, and that, on the other hand, the trifling Farm of *Camiesbie* only excepted, they have not touched, nor indeed could touch, any of his Funds. It does not appear upon what Grounds it can be maintained that they have abused the Trust and Confidence that was reposed in them, or that they intromitted with and squandered away the Effects of their Constituent, leaving him at the same time to starve, and his Debts unpaid.

The Pursuers are sorry to say, that they cannot view *Castlehill's* Conduct in the same Light. *George Cuthbert*, Father of the Defender's Husband, was one of *Plaids's* Curators, and indeed the chief Manager of his Affairs, during his Minority.

Gross Abuses, in various Particulars, had been committed in the Management of the Minor's Affairs; and indeed this is admitted by the Defender herself in her Petition.

Page 3.

As *Castlehill* had never rendered an Account of his Intromissions, and as his Management had been most gross, an

Action of Count and Reckoning was brought, at *Plaids's* Instance, against *Castlehill* and the other Curators, before the Court of Session; but *Castlehill*, having been aware of the Consequences of such an Action, had previously impetrated from *Plaids*, who was a facile Lad, a Discharge of his Intromissions, and of all Demands.—A Copy of this Discharge was formerly produced in Process, the Principal being in *Castlehill's* Hands, and it is hereto subjoined for your Lordships Perusal.

This Discharge was signed at *Inches*, an obscure Place of the Country, *remotis arbitris*, and without any Friend or Relation of the Minor's being present, or so much as acquainted of it.—It bears to be wrote by one *Donald Cuthbert*, who was *Castlehill's Inverness* Writer, and is only witnessed by him and a Tenant of *Castlehill's* and a School-boy, who could know nothing of the Matter.—It is conceived in very anxious Terms on the Part of *Castlehill*, no Copy of it delivered to *Plaids*, no Account instituted, nor any Vouchers delivered, although it is said that several Debts had been paid for *Plaids*, the Vouchers whereof fell to be given up to him.

Castlehill did not think fit to let this Discharge make its Appearance till after the Process of Count and Reckoning had depended for some time.—None of the other Curators had ever seen or heard of such a Discharge, nor are they included in it, neither was it even surmised, before the Calling of the Process, or when the Assignment of this Process to the Trustees was intimated to *Castlehill*, that such a Discharge had been granted.

Soon after this, *John Cuthbert* of *Castlehill*, the Son of *George*, and Husband of this Defender, obtained the Assignment in Process from *Plaids*, of the Back-bonds granted to him by *Imes* and *Clark*, and which is now the Defender's Title in the present Competition.

The Cause of granting the Assignment, as appears from a Back-bond of the same Date, is said to be in Security and Payment, in the first place, of the principal Sum of 4200 *l.*

Scots,

Scots, and Interest, contained in a Bond of Corroboration of 21st *November* 1712, by *Plaids* to old *Castlehill*, and which is excepted from the fore said mutual Discharge, and is of equal Date with it; and, in the next place, of certain other Debts said to be due to himself, and partly due to his Father, prior to the Date of the mutual Discharge.

John Culbert seems to have been so conscious of the Advantage, which was taken of *Plaids* by these Transactions, that the Assignment was kept latent;—it was not intimated, nor did it make its Appearance till the Year 1732, when *Castlehill* raised the Process mentioned in the Defender's Petition and Answers, after *Plaids* had been several Years dead.

The Pursuer shall only further observe, That none of the Grounds of Debt, for Security and Payment of which this Assignment by *Plaids* to *Castlehill* was granted, has hitherto been produced by the Defender; and, notwithstanding that old *Castlehill*, the Father, was alive at the time, yet the Assignment was taken to *John* the Son, although he had no Right in his Person to the Debts, for Payment of which it appears to have been chiefly granted.

Upon the above State of the Fact, it is humbly submitted to your Lordships, with what Justice or Grace the Defender in this Case complains of Fraud, Imposition and Mismanagement, upon the Part of *Innes* and *Clark*, or with what Justice it can be said, that *Castlehill* had interposed for *Plaids's* Relief: And, upon the whole, the Pursuers humbly hope, that your Lordships will, in this Case, have no Difficulty to find, in terms of the Prayer of their Petition, that, upon the Pursuers finding the Caution therein mentioned, the Defender must denude herself of, and assign to the Pursuers the Decree, by which her Claim has been sustained upon the forfeited Estate of *Cromerty*; and, *quoad ultra*, to refuse the Petition for the Defender, and adhere to the Interlocutor of the Lord Ordinary.

In respect whereof, &c.

R O. MACQUEEN.
COPY

COPY of the mutual Discharge, betwixt *George Cuthbert of Castlehill*, and *John Cuthbert of Plaids*, referred to in the foregoing Answers.

AT *Inchas*, the twentie one Day of *November*, One thousand seven hundred and twelve Years, Compt and Reckoning being made and fitted, and faithfully adjusted, betwixt *John Cuthbert*, only lawfull Sone, and Heir served to the decessall Mr. *John Cuthbert*, some time Toun-clerk of *Inverness*, who was Heir served to umquhile *Alexander Cuthbert*, some time Provost of the said Burgh, his Uncle, on the ane Part, and *George Cuthbert of Castlehill*, his Curator, on the other Part : It is found by the said *John Cuthbert*, that the said *George Cuthbert* has trulie, honettlie, and faithfully, not only made true and faithfull Administration of his Trust of Curatory, in and durance his Exercisc thereof, but also, has made good and thankfull Payment to him of all his Intromissions with all Debts, Soumes of Money, House-mailes, Chop-rents, and other Intromissions, of whatsoever Nature, Quantitie, or Quality, by Bonds, Factories, Tacks, Rights, Dispositions, or any other Manner of way he intromitted with, uplifted and received be, for, and in name and behalf of the said *John Cuthbert*, then his Pupill, durance his Pupillarie, or any Time bygone or sincefyne, preceeding this Date : And also, on the othier Part, the said *George Cuthbert* having sufficientlie instructed to the said *John Cuthbert* his Satisfactione, by his faithfull Administration and Intromissions with any Part of the haill Premises, the said *John* finds himself compleatlie, faithfully, and honettlie satisfied and payed thereof, by Payment of Debts for him, Expences of Depurlements, waired out upon him at Schoolls, and Colledges, Lawiers Suites, Pleas, and Process of Law, and severall othere contingent Depurlements for Aliments, Abulziements, and other incident Expences, payed, debursed and expended ;

expended; and specially, by several Deburfements, waired out in, upon, and for Reparationes of his Rigging in *Inverness*, publick Ducs, and many other Advancements made by the said *George* to the said *John*, wheirwith, and anent all Clags, Clames, Questiones, Debeats, Differences, and Contraverfies theiranent, the said *John Cuthbert* finds himself sufficientlie fatisfied and cleared, renounceand all Objectiones, may or can be proponed or alledged in the contrair for ever: And it being just and reasonable, that eitheir Partie should discharge ane another *hinc inde* of the Premiffes; therefore the said *John Cuthbert* and *George Cuthbert*, for them, their respective Heirs, Succesfiores, and Executors, and all others their Assigneys (with and under the Reservationes and Provisiones after mentioned) not only exoner, quite clame, and *simpliciter* discharge ane another of the samen, but also, of all other Debts, Sumes of Money, Clags, Clams, Questiones, Contraverfies, Missives, Accompts, or any Thing else they, or either of them can ask or crave of ane another, eitheir of Intromissiones or Omissiones, or that they, or eitheir of them could, or can any wayes lay to ane anothers Charge, for whatfomever other Cause or Occasione bygone, preceeding the Date, for now and ever; Excepting and reserving allwayes furth and from this mutuall Discharge, ane Bond of Corroboratione, made and granted by the said *John Cuthbert* to the said *George*, of the Date of thir Presents, in Manner, and for the Causes therein exprest, which is nowayes herein comprehended, but allwayes excepted therefrae; and also the Debt payed by the said *George Cuthbert*, by Order of the remanent Curatores to the decest *Robert Rose*, late Bailzie of *Inverness*, for, and in name and behalf, and account of *Alexander Cuthbert*, Tutor to the said *John*, is nowayes herein included, reserving alwayes Action to the said *George*, as accords; which mutuall Discharge above written, with and under the Reservationes and Provisiones aforesaid, both the saids Parties binds and oblidges them, and their foresaids,

to warrand, mantain and defend *hinc inde* to ane another, in and be all Things, in Maner above deduced, at all Hands, and against all mortall, alwayes declaring the Generaltie above written for eitheir Partie, to be all sufficient, valid, and effectuell, as if every Particular anent the hail Premises were herein specially insert, notwithstanding the samen be not sua done, wherewith they, for them and their forsaids, dispence with and discharge forever; and, for the more Securitie, both Parties consents to the Registratiōe hereof in the Books of Councell and Session, or in any other Judges Books competent within this Kingdome, therein to remain for Preservatiōe; and, if Need beis, to have the Strength of ane Act and Decreet of any of the Judges thereof interponed theirto, that Letters of Horning on ten Dayes Charge only, and otheir Letters and Executoriellis needfull may pass hereon, and thereto they constitute

ther Procurators.

In witnes whereof, they have subscribed thir Presents (written be *Donald Cuthbert* Writter in *Inverness*) Day, Moneth, Yeare, and Place forsaide, befor thir Witneses, *James Mackay*, Tenant in *Easter Overdrackies* of *Castlehill*, *David Rose*, Student in *Inverness*, and the said *Donald Cuthbert*. *Sic subscribitur*, *Geo. Cuthbert*, *John Cuthbert*, *James Mackay* Witnes, *David Rose* Witness, *D. Cuthbert* Witness.

Unto the Right Honourable, the Lords of Council and Session,

T H E
P E T I T I O N
O F

Mrs. JEAN HAY, Relict of *John Cuthbert*
of *Castlehill*;

Humbly sheweth,

THAT Provost *Alexander Cuthbert* of *Inverness* died in 1681, possessed of many valuable subjects, particularly several tenements in the town of *Inverness*, and two adjudications against the estates of *Mey* and *Cannishby*, obtained against Sir *William Sinclair*; the first 11th February 1664, the other 14th March 1676.

Provost *Cuthbert* was succeeded by his grand-nephew *John Cuthbert*, afterwards designed of *Plaids*, who was served heir to him when an infant, in 1702, and afterwards turned out to be a weak, facile, and indolent man.

Sir *William Sinclair*'s estate having been brought to a judicial sale, the greatest part of it, situated in *Ross* shire, was purchased by *George Viscount Tarbat*, afterwards Earl of *Cromarty*, and a small part of it, lying in *Caitness*, by *William Innes* writer to the signet, as trustee for *Sinclair* of *Ulster*, and each purchaser obtained decret of sale in his favour.

By the decret of ranking thereafter, Provost *Cuthbert*'s heirs were preferred on the price of the lands purchased by the Earl of *Cromarty*, for 5486 l. 5 s. 8 d. Scots, and on the price of the lands purchased by *Innes*, for 1075 l. 12 s. 4 d. with interest from *Whitsunday* 1694; and by this decret the lands of *West Cannishby*

July 28.
1694.

Cannistby in *Cuthberts* were adjudged to Provost *Cuthbert's* heirs, in satisfaction of the remainder of the debt, no person having offered for these lands at the sale.

The affairs of *Plaidi* were very much neglected and mismanaged during his minority; and though a little attention on his part, when of age, would have soon put them to rights, yet, as he was remarkably weak and indolent, the disorder of his affairs increased, and he was involved in debts and difficulties.

In order to extricate himself from this embarrassed situation, *Plaidi* bethought himself of granting a trust right, a measure which, no doubt, if properly conducted, might have given him some relief; but he unluckily pitched upon two persons for his trustees, who seem to have been very unworthy of the confidence reposed in them by that poor gentleman. The persons were, *Alexander Clark*, merchant, and some time provost of *Inverness*, and *Robert Innes*, designed of *Montrose*, to whom he granted three several dispositions to all his funds, for the purpose of settling his affairs, and paying his debts.

Aug. 15. By the first, he constituted them his trustees, for uplifting all
1709. debts and sums, heritable or moveable, due him by the Earl of *Greenoch*, *Steuair of Mer*, and the tenants of *Cannistby*, and 6000 merks in a bond granted by Sir *James Dunbar*, to all which he assigned them.

Oct. 21. By the second, he conveys to them the said apprisings, with
1709. the lands of *Cannistby*, and the 6000 merks above mentioned.

Jan. 10. This disposition, however, having been reckoned too general,
1709. a third was executed; by which, after reciting the two former, he conveyed to his said trustees, their heirs and assignies, the said two apprisings, the decret of ranking and sale, the sums and lands assigned to him by that decret: And this disposition contains precatory and precept, with an assignation to the heirs and duties begone and in time coming.

Plaidi never having been intert, his trustees obtained, of the same date with the last disposition, a bond from him for 50,000 merks, upon which they charged him to enter heir, and obtained an adjudication of all the subjects conveyed by the above disposition, to be sold with his burgage tenants in *Inverness*.

Of even date with each of these dispositions, a back bond was granted by *Innes* and *Clark*, declaring them to be in trust, and the security of what sums they had advanced for him, or should advance,

advance, with interest, after deduction of which they obliged themselves to be accountable, and to denude in favour of *Plaids*, his heirs or assignes.

Soon after obtaining these dispositions, the trustees entered upon the possession and management of all the subjects they were able to get access to, as all the papers of *Plaids* were delivered up to them upon inventory and receipt at granting the first disposition.

For three or four years, it would appear, these trustees supported *Plaids*, and paid some of his debts; but they soon forgot their duty, misapplied and squandered the funds, allowing the poor man himself almost to starve. In short, their mismanagement was so notorious and remarkable, that it long remained a proverb in that part of the country.

John Cuttbert of *Castlehill*, the petitioner's husband, who was a near relation and considerable creditor to *Plaids*, resolved to take some measures to secure the debt due to himself, and retrieve, if possible, the affairs of his friend.

With this view, *Plaids* granted to *Castlehill* a conveyance of the July 17.
whole subjects he had formerly disposed to *Innes* and *Clark*, and ^{1713.}
to their several back bonds, with full power to call them to an account, and to pursue in his own or cedent's name, "and to hinder and impede any agreements with any of my debtors that may be made by them infrugal or to loss."

Of the same date, *Castlehill* granted backbond to *Plaids*, declaring this conveyance to be in security of debts due to him, amounting then to a capital of 5000 *l. Scots*, and obliged himself to account for his intromissions after deducing these debts.

In 1719. *Clark* became bankrupt, and soon after, so did *Innes*, the other trustee.

The same year, *Clark* having confirmed himself executor to one Mr. *Robert Fraser*, Sir *Patrick Dunbar*, then of *Bowenmadden*, afterwards of *Northfield*, became his cautioner; and for his security *Clark*, by a deed, of this date, conveyed to him all the Aug. 8.
right he had to the different funds which *Plaids* had disposed to ^{1719.}
him and *Innes*; and, *inter alia*, the lands of *Cannusboy*, to the rents of which he assigns him from *Whitsunday* 1719.

As this right, however, was incomplete, seeing it proceeded from *Clark* alone, without a conveyance from *Innes* or his heirs, Sir *Patrick* endeavoured to patch it up in this way. He discovered from some of the transactions of *Innes* and *Clark* in the course of

executing their trust, that *Clark* singly had paid some bonds in which they were jointly bound for *Phaids*, and from this Sir *Patrick* concluded *Clark* was creditor to *Innes*, and upon this obtained himself decerned executor creditor to *Innes* by the commissary of *Moray*, and then obtained decret of constitution *ex natus causa*, against *Jonathan Innes*, son and apparent heir of *Innes* the trustee.

Nov. 7. 1758. Sir *Patrick* died before he had proceeded any further, but his daughter *Elizabeth*, in virtue of a general disposition from her father, confirmed the sums in the said decret *ex natus causa*, and thereupon obtained an adjudication against *Jonathan Innes* for the accumulate sum of 1800 *l. Scots* of *Innes* the trustee's half of the whole subjects that *Phaids* had disposed to him and *Clark*: And this adjudication likewise contains the burgage tenements in *Intercross*, which *Innes* and *Clark* had adjudged from *Phaids* in virtue of the 50000 merks bond above mentioned.

In 1732, *Cuthbert*, the petitioner's husband, for the purpose above mentioned of doing justice to *Phaids*, and to himself as a creditor, brought process against *Innes* and *Clark*, the Earl of *Granville* and Sir *Patrick Dunbar*, who long before this, had obtained possession of all the papers belonging to *Phaids* and of the lands of *West Canmurray*; but *Cuthbert's* death, which happened in 1733, put a stop to that process before any thing material was done.

In 1734, a submission was entered into between Sir *Patrick Dunbar*, and *George Cuthbert*, *Cuthbert's* son, but that likewise blew up before any thing material was done; Sir *Patrick* having only produced an account of the sums advanced by *Innes* and *Clark* for *Phaids*, and *George Cuthbert* made objections to that account.

Dec. 22. 1749. *Cuthbert*, the petitioner's husband, having executed a general disposition in her favour, she obtained upon it an adjudication in implement against his heir of the several subjects of which his estate consisted, particularly the lands of *West Canmurray*, and the sums to which *Phaids* was preferred in the ranking of the creditors of *David* and *Alfred*.

In the 1749, the petitioner for herself and children entered a claim upon the forlorn estate of *Granville* for 5436 *l. 5 s. 8 d.* for which, by the decret of ranking in 1695, the heirs of *David Cuthbert* had been ranked upon the others constituted by the

The crown having objected, that the petitioner had not produced the original grounds of her claim, she obtained a diligence against Sir *Patrick Dunbar*, for recovering the writings necessary, which had been put into his hands by *Innes* and *Clark*, and accordingly Sir *Patrick* appeared, and exhibited upon oath as many as were necessary for supporting the claim.

About the same time the petitioner acquired from *Margaret Cuthbert*, the only child and heir of the above mentioned *John Cuthbert* of *Plaids*, a disposition to all lands, heritages, and other rights which had belonged to her father, and particularly his claim on the estate of *Mey*, and a ratification of all rights and deeds granted by *Plaids* to *Castlehill*.

After a very tedious and expensive litigation with the crown, July 29. 1762. the petitioner had her claim sustained by the unanimous judgment of your Lordships.

After all this, and after Sir *Patrick Dunbar* had suffered the petitioner, at a great expence, to obtain a judgment against the crown, without interfering, the petitioner did not expect the litigation with which she has been since distressed by his daughter, now spouse to *Francis Sinclair* of *Durin*, Esq; but that lady and her husband thought proper, upon the conveyance from Sir *Patrick* to her, and upon those from *Innes* and *Clark* to Sir *Patrick*, to bring an action before this court, against the petitioner and the officers of state, concluding to have it found and declared, that she had a preferable right to the debt upon the estate of *Gromarty*, and that, therefore, the petitioner should be decreed to denude in her favour of that claim, and of the decret sustaining it.

In support of this action, she alledged, that *Innes* and *Clark* had advanced to the extent of 30000 *l. Scots* for *Plaids*, and produced an accompt to show this, with some vouchers, but no credit was given for any intromissions had with the subjects of *Plaids*.

The cause came in course before Lord *Gardenstoun*, who, of this date, ordained the pursuer to give in an accompt of her, or her Nov. 24. 1764. author's intromissions with the effects of *John Cuthbert*.

But the pursuer, instead of complying with the interlocutor, gave in an accompt or condescendence, which was a mere go-by, and indeed she insisted that she was not obliged to enter into a compt and reckoning; and that, *ante omnia*, the petitioner should be obliged to denude in her favours. This the petitioner denied, and likewise insisted, that the pursuer had no title to maintain

the action, unless she showed to what extent Sir *Patrick* had paid, or been distressed as cautioner for *Clark*.

Dec. 1765. The Lord Ordinary, of this date, pronounced the following interlocutor: " Having considered the above debate, mutual memorials, " and hail processs, finds, that the defender, in virtue of her titles " founded upon, and particularly in virtue of the decret sustaining " her claim, is vested in the right and property of the " debt upon the foretold estate of *Granby*. Finds, that the pursuer " is not entitled to insist, that the defender shall denude of " said debt in her favour, excepting in so far as the said pursuer " shall instruct distress or payment of the debt, for the relief of " which, Sir *Patrick Dunbar* got a conveyance from *Clark*: Finds, " that the pursuer cannot found upon the right of *Innes*, excepting " in so far as she shall instruct, that *Innes* was a creditor to " *Phinds* by advances made under the trust conveyance to him " and *Clark*; and in so far, as the said pursuer shall also instruct, " that she is a just and lawful creditor to *Innes*; and allows her " to give in an account of charge and discharge accordingly. " ly."

Feb. 11 1766. Thereafter, upon a representation for the pursuers, and answers, the Lord Ordinary pronounced the following interlocutor: " Having considered the representation with answers, and again " reviewed the former proceedings, adheres to the former " interlocutor, in so far as it finds, that the defender, in virtue " of her title founded upon, and particularly in virtue of the decret sustaining her claim, is vested in the right and property " of the debt upon the foretold estate of *Granby*; but varies " the subsequent part of the interlocutor, and finds, that the conveyance of this debt granted by *Phinds*, was only a right in " security for the sums truly advanced, or to be advanced by *Innes* and *Clark* for *Phinds* behoof, and was a trust as to the residue or reversion, which trust *Innes* and *Clark* could not transfer to Sir *Patrick Dunbar*: Finds, that the pursuer is entitled to " insist, that the defender shall denude in her favour, in so far, " as the said pursuer shall instruct *Innes* and *Clark* were creditors " to *Phinds*, and that she is not obliged to instruct to what extent Sir *Patrick Dunbar* was creditor to *Innes* and *Clark* his authors, and ordains her to give in an account of charge and discharge thereof accordingly."

Against

Against this interlocutor, both parties preferred representations, which were both refused by the Lord Ordinary; and both parties having preferred reclaiming petitions, they were, upon answers, both refused by your Lordships. And thus it became a settled point, that the pursuer was entitled to insist, the petitioner should denude in her favour, in so far as she could instruct that *Innes* and *Clark* were creditors to *Plaids*.

When the cause came back to the Ordinary, the pursuer exhibited an accompt of the sums advanced by *Innes* and *Clark* for *Plaids*, without charging herself with any intromissions, which she insisted she was not obliged to do, and that it was incumbent on the petitioner to prove intromissions and would have had a remit to an accomptant on that plan. But this having been opposed by the petitioner, the Lord Ordinary remitted to *Ludovick Grant* accomptant, to hear parties doers, and report upon the whole cause.

Mr. *Grant* having accordingly done so, the petitioner gave in objections chiefly against an article in the report, giving an opinion, that the pursuer was not to be charged with the 6000 merks bond above mentioned, as to which it is unnecessary to say any thing in this petition, the question being still intire, and depending before the Lord Ordinary.

The petitioner having insisted, that the pursuers should charge themselves with 1071 *l. Scots*, with interest from 1694, for which *Plaids* was preferred on the lands of *Westerdale*, purchased by *William Innes* for *Ulbster*, which sum with interest, was uplifted by *Innes* and *Clark*, and assigned by them to the purchaser, by disposition dated 6th and 24th *November* 1710. The report gave no opinion as to this point, but kept it open in respect a diligence had been granted for recovering the said disposition.

The pursuers had strenuously controverted this article being charged against them; but the defender having providentially discovered this disposition, owing intirely to the accident of her former doer *William Budge* being also doer for *Ulbster*, she produced this disposition along with the objections, which put an end to any question upon this point.

As the report said nothing about charging the pursuers with the houses in *Inverness*, the petitioner in her objections stated the reasons, to be afterwards explained, for charging the pursuers with them.

June 15.
1768. The pursuers having made answers to these objections, the Lord Ordinary pronounced the following interlocutor: " The Lord Ordinary having considered the accomptant's report, with the representation for the defender, and objections for her, and the answers for the pursuer, repels the objections, and approves of the report; and appoints both parties to give in memorials on the questions stated by the accomptant, for the Lord Ordinary's opinion."

The points in the accomptant's report, referred for a further hearing before the Lord Ordinary, were three, *viz.* From what period the pursuer was to be charged with the rents of *Cumshy*, whether from the 1719, when the pursuer admitted Sir Patrick Dunbar attained the possession in consequence of the disposition from Clark; or from the 1709, when *Phair* conveyed them to *Imrie* and Clark; or from the 1694, the commencement of *Phair's* own right, as he alleged the trustees to all the before-mentioned parties? *2th*, At what rate the virtual was to be converted in accompting. *And, 3th*, In what manner the value of the lands was to be ascertained and accounted for.

July 14.
1768. Memorials having been accordingly given in, the Lord Ordinary pronounced the following interlocutor: " The Lord Ordinary having considered the memorials for both parties, finds, that the pursuers are only obliged to account for the rents of the lands of *Cumshy*, from *Whitsunday* 1719, in respect the defender offers no proof of an earlier possession by *Imrie* and Clark the original trustees, and shows no sufficient cause for resting upon bare presumptions of an earlier possession. Finds, that the virtual rent must be converted at the rate of the fines, unless the defender will undertake to prove the current price of virtual for the several years in question: Finds, that the conveyance from *Imrie* and Clark to Sir Patrick Dunbar imported only a right in security; and therefore there is no room for determining the third question proposed by the accomptant, *viz.* in what manner the value of the said lands is to be ascertained and accounted for."

The prisoner represented against the interlocutor of the 15th of *June* 1768, in which she insisted, that the pursuer should be charged with the 625 marks bond, and the 1671 *L. Scots*, with interest, as to which last the pursuer in her answers only controverted *gross* the interest, and along with this representation the prisoner produced the signed inventory of *Phair's* papers, to be afterwards particularly mentioned, and she insisted, that this put

put an end to the pursuer's demand altogether, till she either restored the papers, showed what had become of the subjects, or else accounted for the sums the trustees ought to have recovered in consequence of them.

The pursuers made answers, in which they opposed all the demands of the representation, except with respect to the 1071 *l. Scots*; and the Lord Ordinary found, " that the article of 1071 *l. Scots* must be charged against the pursuers, and in stating the account, must be imputed as a payment made by *Plaids* of the sums advanced by *Innes* and *Clark* for his behoof; in all other points, refuses the desire of the representation, and adheres to the former interlocutor." July 26.
1768.

The petitioner preferred a representation against the interlocutor pronounced on advising the memorials, in so far as it finds the pursuers were only liable to account for the lands of *West Cannisby*, from *Whitsunday* 1719; and also, a representation against the above interlocutor of the 26th *July* 1768. The pursuers made an answer at once to both representations, in which they agree, that not only the principal of the 1071 *l. Scots*, but also, interest should be charged against them; and the Lord Ordinary of this date, was pleased to refuse both representations. Nov. 19.
1768.

Thereafter, at a calling of this date, the pursuers obtained a remit to the accomptant " to make up an accompt betwixt the parties, agreeable to the interlocutors in process, and to report the same, together with his opinion, what the trustees should have as a gratification for their trouble." Nov. 25.
1768.

The petitioner must submit the above interlocutors to review, so far as they find, 1st, That the pursuer may insist against the petitioner, without either restoring the papers contained in the signed inventory, showing what became of the subjects, or accounting for the sums they ought to have recovered in consequence of them.—2^{dly}, In so far as they find the pursuer is not to be charged with the houses in *Inverness*.—And, 3^{dly}, In so far as they find that the pursuer is only to be liable to account for the rents of *West Cannisby* from *Whitsunday* 1719.

In the entrance, the petitioner must observe, that there cannot be a more unfavourable and ungracious plea than that maintained by the pursuer in this case; and that, whether it be considered in so far as her own right goes, or that of her authors. In so far as her own right goes, because the pursuer lay by during the

whole tedious litigation between the petitioner and the crown; and would now reap, at a single stroke, the fruits of the petitioner's immense expence and trouble in that affair. And as to the pursuer's plea in right of her authors, it is as unfavourable in a double view; for the petitioner is, as has been already stated, in the right of *Phelps*; and the pursuer, in the character of *James* and *Clark*, trustees for *Phelps*, is wanting to take *Phelps's* estate from him, and to make it go in payment of their debts: And as to *Sir Patrick Dunbar's* right, there is no evidence that he ever paid, or was satisfied for a shilling on account of *Clark*; and it is clear, he has no shadow of a title to *James's* half, though it may be true, that the petitioner is not properly interested to make the objection; so that it is clear, in this case, that the pursuer is taking the law of the petitioner; and, as it is a maxim, that he who takes equity should give equity, so it equally ought to hold, that he who takes law should give law; that is to say, the petitioner is not intitled to found upon equitable constructions or presumptions; but as her demand is founded upon rigorous law, the rules of it must be adhered to in trying the pursuer's different claims.

The first point that the petitioner submits to review, is that part of the interlocutor which over-rules the petitioner's objection, that the pursuers cannot be heard, till they either restore the papers contained in the inventories, or shew what became of the subjects, or account for the sums they ought to have recovered in consequence of them.

These inventories were not recovered and produced, till some process had been made in the cause, and not till after repeated searches had been made, which was owing to the very particular situation of the petitioner, fully explained in her former papers. These inventories, with the receipts upon them, are annexed to this petition. The pursuer, till they were produced, denied that any such had existed, which shews what regard is to be paid to their averments, however bold. After they were produced, the pursuer blamed the petitioner for keeping them up so long, and ascribed the delay to the petitioner's apprehension of their making against her with respect to the 6000 merks bond, as that is not mentioned in them.

But this is altogether affected. It appeared from writings in process, that inventories had been made up and delivered to the trustees,

trustees, and the petitioner was all along desirous to find them; but that was impossible, from the confusion her papers were in, owing to her peculiar situation. The way in which the petitioner came to have them among her papers, was in consequence of the processes of exhibition and others, raised by *Margaret* the daughter of *Plaid*, against *Innes* and *Clark*, and *Sir Patrick Dunbar*; but having been thrown by among an immense mass of other papers, they lurked there for a long time, and were not discovered by the petitioner's agent till after repeated searches.

The first, it will be observed, is a regular inventory, of even date with the first trust right granted by *Plaid* to *Innes* and *Clark*: It narrates the different writings according to the *bundles* in which they were bound up and delivered to them; and a receipt for them is subjoined.

The next inventory is quoted on the back, "Inventory of *John Cutbbert's* papers sent to *Edinburgh* to *Mondole*, 5th July 1712." *Mondole* was *Robert Innes* the other trustee, and his receipt is as follows: "The above and within papers were delivered to me, and are at *Edinburgh* in order to their business whereof. This is receipt from,

(Signed,) RO. INNES."

Now, seeing that by these inventories and receipts, it is fixed, that *Innes* and *Clark* received all the papers belonging to *Plaid*, not only charters and appraisings, but likewise bonds due to him; the petitioner imagines it is clear, that she is well founded in her first ground of reclaiming, as it is surely incumbent upon the pursuers to restore these papers, or account for the sums they ought to have recovered in consequence of them, or otherways show what became of them before they can bring any charge against the petitioner. This is an obligation to which tutors, factors, trustees, and all persons acting for others, are subject.

In so far as the petitioner can show a particular intromission had by *Innes* and *Clark*, that must, no doubt, so far diminish the particular sum, which the pursuer can show they advanced for *Plaid*; but further, the petitioner humbly apprehends, that the pursuer, in the right of *Innes* and *Clark*, can bring no charge against her, till they account for their intromissions with the papers fixed upon them by the receipts above mentioned, that is, either

either restore the papers, account for the contents, or show what has become of them.

The pursuer objected, that the writings contained in the inventory, relate to the debt on the estate of *Mer*, which is still outstanding, and the subject of the present question.

So far as the writs relate to the debt in question, the answer is no doubt good: But it will be observed, that the inventory contains many other writings that have no relation to that debt, and particularly a number of bonds.

The pursuer said, these bonds were now long ago prescribed.

But it is no answer to say, the bonds are *now* prescribed. Could the pursuer have said, that the bonds were prescribed at the date of the inventory, that might have been some defence or excuse for not producing them, or being accountable for them; because the defence of prescription might have hindered their recovering payment of them; but as the bonds, from their dates, appear not to have been prescribed at the date of the inventory or trust rights, it is a jest to say, that their being now more than forty years old can afford the pursuer any defence against her being accountable for them, in consequence of the receipts granted by her authors. The presumption arising from the not delivery is, that the trustees recovered the contents, and thereupon gave up the bonds discharged to the several debtors.

With regard to the second inventory, and receipt upon it, the pursuer objected, that it was improbable, and prescribed; and that it does not appear, that the writings therein contained belonged to *Phaul*, or that the *Robert Innes* who signed the receipt was *Innes of Murchie*, one of the trustees.

But it is thought these objections will have very little weight, when the inventories and receipt are perused: it is obviously the subscription and the hand writing of the same *Robert Innes*, whose hand writing and subscription appear so frequently to the other documents in process; and from the title on the back, and the description of the writings themselves, it is clear they must have belonged to *Phaul*.

As to the prescription, it cannot apply to a case of a compt and reckoning: For, so long as the pursuer's action for advances under the trust can subsist, the documents of their intromissions must also remain in force. Many of the vouchers of advances founded on by the pursuer would at this time of day be prescribed, and can only be supported by the trust disposition, as ad-

vances

vances made under it ; and it would be extremely hard and unjust, if the documents of the intromissions of the trustees should not have the same support.

It was further objected for the pursuers, that this inventory was not complete, and that it seemed only to be a part of one, as it began with an *item*.

Whether this inventory 1712 contained any more writings, the petitioner cannot say: If it did, the pursuer is so far lucky ; for if it had contained more, the charge against her would have been greater ; but it surely cannot avoid *Mendole's* obligation with respect to what is fixed upon him, that the petitioner has accidentally lost a part of the document that would have enlarged the charge.

The next point which the petitioner proposes to submit to review, is that part of the interlocutor which finds, that the pursuers are not to be charged with the houses in *Inverness*.

The petitioner humbly apprehends, the pursuer ought to be charged with them ; because, in the first place, there is an article in the first inventory, bearing, "affidations of umquhile John *Cuthbert's* borough lands of *Inverness* ;" which demonstrates, that *Innes* and *Clark* took the management and possession of these houses, as well as of the other subjects. Art. 21.

2dly, There is an article in *Innes's* accòmpts produced, stating, for "going to *Inverness*, and staying there for four days, in order "to sell John *Cuthbert's* houses."

Lastly, It is instructed, that *Innes* and *Clark* adjudged these houses, and they have not the adjudication to produce ; which shows that it has been given up to the purchaser, as it was the radical title to these subjects.

The petitioner submits to your Lordships, if these circumstances do not afford the strongest presumptive evidence, that *Innes* and *Clark* did sell these houses, and that it is sufficient to make them accountable for them.

The last point to be submitted to review, is, from what period the pursuers are to accòmpt for the lands of *West Cannisbay*. The Lord Ordinary has found, that they only are so from 1719, when *Innes* and *Clark* conveyed them to Sir *Patrick Dunbar*.

Upon this point it will be observed, that *Plaids* conveyed to *Innes* and *Clark* these lands which had been adjudged to him in 1694 ; and that in the disposition he assigns his trustees to the

rents from *Whitfield* 1694, when his own right commenced, which is very good evidence, that in 1719, when the trustees got their right, that *Ponds* himself had not uplifted any of the rents. Now, as it is admitted, that *Innes* and *Carr*, or Sir *Patrick Dunbar* in their right, were in possession in 1719, it is clear, that they must be presumed to have been in possession *retro* from the date of their right from *Plaid*, and accountable for the whole intervening period, unless in so far as they can show they were not in possession; because, since it is admitted they got a right to these lands, and that possession actually followed upon that right, the presumption certainly is, that the possession was held from the date of the right, unless the pursuer will instruct the contrary, the *onus probandi* being evidently thrown upon them, from the admitted circumstance, that possession did follow upon their right.

The pursuer, in answer to this, observed, that the trustees were only liable for their actual intrusions, not for omissions.

But it is not, with submission, obvious, of what use this observation can be to the pursuer. Had it not been proved or admitted, that possession had followed upon their right, they would not have been liable for any part of the rents, nor quarrellable for negligence or inattention: So far, no doubt, the proviso in the trust disposition would protect them. But, after it is proved and admitted, that, *de facto*, possession followed upon the right, that proviso can have no influence upon the question, from what period their possession shall be held to have commenced. Such proviso in trust dispositions was never meant or construed, so as to destroy or diminish the natural and usual consequences and inferences drawn from legal presumptions. And if it be a legal presumption, as the petitioner humbly conceives it undoubtedly is, that a person found in possession of a subject, is to be presumed to have been in possession from the date of the right on which he possesses; then, it is evident, the pursuer must account for the rent of these lands from 1719, the date of the right to the trustees.

Sir *Patrick Dunbar's* right cannot be considered as a separate or detached right: it flowed from *Innes* and *Carr*, and Sir *Patrick's* possession was their possession. Indeed, *Innes* and *Carr* having disposed to Sir *Patrick* in 1719, is pretty good evidence of itself, that

that they were previously in possession, as no man would readily dispose to another what he himself was not possessed of; and this is fortified by a variety of corroborative circumstances. The weakness and facility of *Plaids* renders it improbable, that he would recover the rents: And accordingly we see, that from 1694 to 1710, he had not. Is it then any more to be supposed, that he would, from 1710 to 1719? Besides, *Innes* and *Clark*, the pursuer alledges, were creditors in great sums to *Plaids*; and therefore it is incredible, that they would not take possession *quamprimum* upon the deed 1710. And this is made still clearer from a clause that occurs in the disposition by *Clark* to Sir *Patrick* in 1719. By that deed, *Clark* was anxious to convey to Sir *Patrick* all right and title whatever he had; and yet he only assigns him to the mails and duties of *West Cannisbay* from *Whitunday* 1719; though it will be observed, that he himself had been assigned to these mails and duties by *Plaids*, from *Whitunday* 1694, which is real evidence, that *Clark* had uplifted all the rents from that period to 1719; because, if they had not been uplifted; but *in medio*, he undoubtedly would have assigned them to Sir *Patrick*, to whom he was anxious to convey every thing.

However, the petitioner has no occasion to resort to corroborative circumstances; because, as it is admitted, that possession did follow upon the deed 1710, the legal presumption certainly is, that it took place from the date of the right.

The petitioner has only to add, that there is the more reason for giving force to legal presumption upon this and the other points, on account of the impossibility of the petitioner being able to bring any direct proof: All the papers and vouchers of *Plaids* were given up by him to his trustees, and by them to Sir *Patrick Dunbar*; so that the petitioner cannot bring written evidence, and the lapse of time renders it impracticable for her to bring parole evidence as to these intromissions: Whereas Sir *Patrick Dunbar*, who confessedly possessed since the 1719, and his daughter the pursuer, who lives in that country, and is still in possession, could be at no loss to condescend upon those who were in possession for the period in dispute, if it was not the trustees. The bold and obstinate averments of the pursuer in this case, ought to have no sort of regard paid them, as they have been redargued from time to time by irrefragable evidence.— Thus, they denied, that ever any inventory had existed. Nay, they

they for a long time denied that they ought to be charged with the 1071 *l. Scots* above mentioned, or that they had ever received it. And, in their printed answers, page 23. they say, "As there is not the veilige of evidence produced, that they had any intromission with this sum, it is amazing the defender should take the liberty still to persist in this averment:" Tho' afterwards, upon recovery and production of the disposition to *Ullster*, they were obliged to allow, that both principal and interest were to be charged against them. From all which, it is evident, that it would be extremely hard and unjust to allow the pursuer to give in only an account of charge against *Pluids*, without accounting for any intromissions, or showing what had become of his effects; and that the petitioner should be put to prove directly the precise extent of their intromissions, otherwise, that the whole of their charge should be sustained.

May it therefore please your Lordships to review the Lord Ordinary's interlocutors; and to find, that the pursuers can bring no charge against the petitioner, till they either restore the papers contained in the inventories above mentioned, or shew what became of them, or account for the sums they ought to have recovered in consequence of them; 2do. To find, that the pursuers must account for the houses in Invernelt; as also, for the rents of the lands of Cannilbay, from 1694, or, at least, from the 1710.

According to justice, &c.

JOHN MACLAURIN.

COPY INVENTORY of the PAPERS
 belonging to Mr. *John Cuthbert*, given up at
Forres, 16th *August* 17-9 Years, contained in
 the Bundle, No. I.

Registrate obligation, Dunbar *contra* Sinclair, 1659.

Bond, Laird Mey, dated December 4th, 1656.

Registrate obligation, Alexander Dunbar *contra* Sir William Sinclair, 1663.

Horning, Dunbar *contra* Sinclair, 1659.

Horning, Dunbar *contra* Sinclair, 1661.

Inhibition and arrestment, Dunbar *contra* Sinclair, and execution thereof, 1663.

Caption, Dunbar *contra* Sinclair, 1663.

Summons of removal, Dunbar *contra* Sinclair's tenants, 1675.

Caption. Dunbar *contra* the said tenants, 1675.

Apprising, Dunbar *contra* Sinclair.

Warning, Dunbar *contra* the said tenants, 1675.

Horning, Dunbar *contra* the superiors.

Execution, Dunbar *contra* the bishop of Ross, &c.

Execution of apprising, Dunbar *contra* Sinclair, 1663 and 1664.

Double act *contra* Smith of Bracco, and others, 1674.

Extract disposition, Provost Dunbar to Provost Cuthbert, 1674.

Execution, Dunbar *contra* Bishop of Caithness, 1664.

Execution, Dunbar *contra* the executors of Caithness, 1664.

Special charge, Dunbar *contra* Sinclair, 1663.

Execution of appretiation, Cuthbert *contra* Sinclair, 1663 and 1664.

Horning, Alexander Cuthbert *contra* tenants of Mey.

Act, Dunbar *contra* Smith of Braco, and others.

Double disposition, ditto to Mackenzie.

Extract obligation, Mey to Alexander Cuthbert, 1663.

Precept, Cuthbert *contra* Mey, 1662.

Execution, Cuthbert *contra* the Bishops of Murray and Caithness, 1664.

Execution, Cuthbert on horning *contra* Earl of Caithness.

PAPERS contained in Bundle, No. II.

- Extract obligation, Polson *contra* Sinclair and cautioner, 1667.
 Instrument, Polson *contra* Sinclair.
 Precept, Polson *contra* Sinclair and cautioner, 1661.
 Horning upon the same, 1662.
 Caption thereupon, 1662.
 Extract assignation, disposition, ratification, Rofs to Polson,
 1663.
 Assignation and ratification, Rofs and Polson to Cuthbert,
 1663.
 Extract assignation, Polson to Polson, 1662.
 Special charge, Polson *contra* Sinclair, 1663.
 Extract assignation and translation, Polson of Markneis to Pro-
 vost Cuthbert, 1675.
 Horning, Cuthbert *contra* Superiors.
 Letters of apprising, Cuthbert *contra* Sinclair and cautioner,
 1668.
 Execution, Cuthbert *contra* the bishop of Rofs.
 Horning, Cuthbert *contra* Superiors, 1664.
 Horning, Cuthbert *contra* Sinclair, 1662.
 Diligence, Cuthbert *contra* the Laird of Mey, and others,
 1681.
 Execution *contra* fundry persons, 1676.
 Summons of declarator *contra* Sir William Sinclair, Bracco,
 &c.
 Caption, Cuthbert *contra* Sinclair.
 Extract obligation, Hart *contra* Laird of Mey and his cau-
 tioners.
 Special charge, Cuthbert to Sinclair, 1663.
 Summons, Cuthbert *contra* Sinclair.

PAPERS contained in Bundle, No. III. and No. IV.

- Decreet of apprising, Alexander Dunbar *contra* Laird of Mey,
 1664.

Decreet

Decreet of certification, Cuthbert *contra* Smith, and others,
1678.

Decreet of apprising, Cuthbert *contra* Sinclair.

Accompt of the two apprisings, Cuthbert and Dunbar, *contra*
the laird of Mey, amounting to at Martinmas 1688,—54277
marks.

Execution of adjudication, Cuthbert *contra* Lord Tarbat,
1681.

An inventory of the papers belonging to Alexander Cuthbert.

Letters Cuthbert to Cuthbert.

Letters Rofs to Cuthbert.

Execution against the persons therein named.

Extract minute of feasing of the lands of Lochs-line, and o-
thers.

Tack Cuthbert to Alexander Duff 1679.

Protestation *contra* the Laird of Mey, and others.

Note of apprisings against the Earl of Caithness, 1664.

Precept of warning Alexander Cuthbert against his tenants.

Inventory of papers left by Provost Dunbar, to William Gor-
don.

PAPERS contained in the FIFTH BUNDLE.

Instrument of possession in favours of Alexander Cuthbert, on
the castle of Lochsline.

Tack betwixt Cuthbert and Mackenzie, 1679.

Tack betwixt Cuthbert and James Rofs, 1679.

Tack ditto and Reoch, 1679.

Tack ditto and Macmartin Millar, 1679.

Tack ditto and Ronald Bain, 1679.

Tack ditto to Donald Rofs, 1679.

Tack ditto to Walter Rofs, 1679.

Tack ditto to George Rofs, 1679.

Tack ditto to Alexander Roy, 1679.

Tack ditto to Donald Macwilliam, 1679.

Tack ditto to William Macandrew, 1679.

Tack ditto to Andrew Ganaw, 1679.

Tack ditto to Donald Tailzeor, 1679.

Tack ditto to Donald Reoch, 1679.

Tack ditto to Donald Macrobert, and others, 1679.

Tack ditto to William Macinteer, 1679.

Tack ditto to John Macandrew, 1679.

Baron court holden at Lochslane, March 12th 1679.

Factory Cathbert to Duff. 1679.

Past bill of suspension, Cuthbert *contra* Mackenzie.

Execution Cathbert *contra* Thomas Macgellas, and others, 1674.

Instrument of intimation, Cuthbert *contra* Macleod, 1679.

Execution of warning, Cuthbert against Tenants, 1674.

Accompt of deburlements, Cuthbert anent the Laird of Mey, 1674.

Commission Alexander Cuthbert to Mr. John Cuthbert.

Information Cuthbert to Gordon, May 2d 1674.

Double bill of suspension, Ross and others, 1679.

Safine Mr. Rorie Mackenzie on the lands of Cadboll, 1679.

Scroll decreet Lady Ratter *contra* Tenants of May, 1678.

Here follows a part of the INVENTAR of Mr. JOHN CUTHBERT's Papers, given up at FORRES the 15th day of AUGUST 1709 years, contained in the 5th Bundle.

Contract of wadset, May and Braco.

Baron court holden by Cuthbert, 1678.

Bond Donald Fiddes, and others, to Cuthbert, 1678.

Bond Ross and others to Cuthbert, 1678.

Bond James Ross to Cuthbert, 1678.

Bond Andrew Glavie to Cuthbert, 1678.

Bond Duff to Cuthbert, 1678.

Bond James and others to Cuthbert, 1678.

Bill of intimation to the Lords of council.

Rental of the lands of Catbow.

Double suspension *contra* Cuthbert, 1679.

Follows the INVENTORY of the PARCHMENTS belonging to the said JOHN CUTHBERT, given up place and date foresaid.

Carta appretiationis Alexandri Cuthbert, terrarum infra script. per Notarium Rodion. July 10th 1674.

Carta appretiationis Alexandri Dumbear, terrarum infra script. per Notarium Rodion. July 10th 1664.

Safine

Safina Alexandri Dunbar, terrarum de Cadboll, terrarum infra script. Ap. 4. 1664.

Safina Alexandri Cuthbert, terrarum de Killimure, terrarumque infra script. August 2d 1664.

Carta Alexandri Cuthbert, terarum de Cadboll, terrarumque infra script. Martii 27, et Aprilis 1mo, 1664.

Safina Alexandri Dunbar, terrarum baroniæ de Mey et Canasbay, ceterarumq. infra script. Aprilis 4to 1664.

Charter of confirmation upon the said lands.

Safina Alexandri Cuthbert, terrarum de Cadboll, aliarumque infra scriptarum.

Safina Alexandri Cuthbert, terrarum baroniæ de Mey et Canasbay, terrarum infra script. Aprilis 4to 1664.

Charter by the exchequer, in favours of Alexander Dunbar March 4. 1664.

Charter by ditto, in favours of Alexander Cuthbert, date foresaid.

Carta appretiationis Alexandri Dunbar, burgen. de Inverness, terrarum et baroniarum de Mey et Canasbay.

Safina Alexandri Dunbar, terrarum aliarumque infra script. cum pertinen. December 1664.

Carta Alexandri Dunbar, terrarum de Cadboll, aliorumque infra script. per Episc. Moravien, ultimo et vigesimo septimo Aprilis 1664.

Safina Alexandri Cuthbert, terrarum aliarumque infra script. Septembris 14 1664.

The within written page, and the other two preceding pages, contain the true inventory of the haill papers and parchments within and in them specified, as they are given and received by us Robert Innes of Mondole, and Mr. Alexander Clark, one of the present baillies of Inverness, from Mr. John Cuthbert, heir served and retoured to the deceast Mr. John Cuthbert town clerk of the said burgh of Inverness:—In witness whereof, the said three pages, with the above written, are signed by both parties at Forres the 15th day of August 1709 years, written be Jonathan Alves writer in Forres, before these witnesses, Alexander Cumming of Logie, Jonathan Dunbar of Tilliglen, Alexander Hardie writer in Forres, and the said Jonathan Alves, writer foresaid; signed, Robert Innes, Alexander Clark, John Cuthbert. Alexander Cumming witness, Jonathan Dunbar witness, Alexander Hardie witness, Jonathan Alves witness.

Copy INVENTORY of JOHN CUTHBERT'S
Papers, sent to Monro to Edinburgh 5th July
1742.

- Item*, Bond, Cuthbert to Hugh Falconar, 1685.
Item, Precept, Alexander Cuthbert to Hugh Falconar, with receipt thereon, 1685.
Item, Discharge Thomson to Cuthbert, 1685.
Item, Precept Alexander Cuthbert, tutor, on Alexander Cuthbert, James's son, 1687.
Item, Horning and pointing Cuthbert against debtors, 1686.
Item, Summons Cuthbert against debtors, 1685.
Item, Double bond Mr. John Cuthbert to Culloden, 1679.
Item, Bond Cuthbert to Polson, 1683.
Item, Suspension and relaxation, Cuthbert against commissaries of Inverness, 1683.
Item, Precept and pointing, Baillie Robertson against Alexander Cuthbert, 1683.
Item, Bond Cuthbert to Stewart, 1681.
Item, Caption Cuthbert against Mackenzie, 1690.
Item, Magistrate bond Cuthbert, and his cautioner to Hugh Robertson, 1671.
Item, Precept Cuthbert on Rofs, 1685.
Item, Scroll direct, Margaret Leslie against John and Alexander Cuthberts, 1607.
Item, Bond Alexander Cuthbert to John Cuthbert, with one bill on the back of the same, 85 and 86.
Item, Discharge Kailach to Cuthbert, 1685.
Item, Precept Alexander Cuthbert to Jean Fraser, 1680.
Item, Discharge Mr. John Cuthbert to Mr. Rodrick Mackenzie, 1686.
Item, One bundle of accounts, consisting of 20 pieces.
Item, Precept Alexander Cuthbert upon Andrew Man, payable to David Cumming, 1687.
Item, Precept Alexander Cuthbert-Davidson to Alexander Cuthbert, James's son, to William Neilson, 1687.
Item, Precept Rofs to Cuthbert, 1681.

Item,

- Item*, Twenty-two assedations of umquhile Mr. John Cuthbert's
borough land of Inverness.
- Item*, Obligation tutor Cuthbert to his pupil, 1705.
- Item*, Extract testament umquhile Mr. John Cuthbert, 1686.
- Item*, Ticket Alexander Sibbald to James Cuthbert, 1661.
- Item*, Bond John Mackain to Alexander Cuthbert, 1671.
- Item*, Execution on horning, Cuthbert against Mackenzie of Tarbat and Urquhart of Cromarty.
- Item*, Ane list of bonds delivered to Mondole at Rothes, 1711.
- Item*, Precept of poinding Macintosh against Cuthbert, 1698.
- Item*, Assignment Thomas Kincaid to Samuel Cuthbert, 1683.
- Item*, Accompt of Mr. John Cuthbert his funeral charges, 1683.
- Item*, Receipt Alexander Cuthbert, tutor to Sir Alexander Mackenzie, 1688.
- Item*, Assignment and translation Baillie Macintosh to Cuthbert, 1702.
- Item*, Assignment and translation Mr. David Polson to Cuthbert, 1705.
- Item*, Registrate bond Alexander Cuthbert tutor, and his cautioner, to Mr. Polson, 1691.
- Item*, Report of an act and commission in favour of tutor Cuthbert, for his pupil, before the baillies of Inverness, for proving the rental of some houses, tenements, &c. dated 1685.
- Item*, Eleven pieces of accompts anent the tutor's mismanagement.
- Item*, Charge John Cuthbert and his curators against tutor Cuthbert, 1690.
- Item*, Discharge John Cuthbert to Roskine, 1674.
- Item*, Receipt of annualrent Cumming to Cuthbert, 1681.

The above, and within papers, were delivered to me, and are at Edinburgh, in order to thir businels, whereof this is a receipt from

(Signed) RO. INNES.

DECEMBER 22, 1768.

A N S W E R S

FOR

Mrs. ELIZABETH DUNBAR, lawful Daughter, general Disponee, and Executrix confirmed to the deceased Sir *Patrick Dunbar* of *Northfield*, Baronet, and for *James Sinclair* of *Duran* Esq; her Husband, for his Interest,

TO THE

PETITION of Mrs. JANE HAY, Relict of JOHN CUTHBERT of *Castlehill*.

GEORGE first Earl of *Cromarty* having purchased Part of the Estate that belonged to the deceased Sir *James Sinclair* of *Mey*, at a judicial Sale before your Lordships, was decerned, by the Decree dividing the Price, February 21st 1695. to pay to those having Right to two Apprisings affecting that Estate, the Sum of 5154 l. 15 s. 10 d. with that of 331 l. 9 s. 10 d. both Scots, and Interest from *Whitsunday* 1694, and in Time coming, during the Not-payment.

William Innes, Writer to the Signet, who purchased another Part of the Estate, for behoof of *Sinclair* of *Ulster*, was in like manner decerned to pay to the same Persons the Sum of 1071 l. 12 s. 4 d. Scots, with Interest from the foresaid Term of *Whitsunday* 1694.

These Apprisings, which had originally been led at the Instance of *Alexander Cuthbert* Provost, and *Alexander Dunbar* Merchant in
A Inverness,

1664.

Inverness, came by Progress into the Person of the deceased *John Cathbert of Plaidis*.

It is said in the Petition, Page 2d, "That *Plaidis's* Affairs were "greatly mismanaged during his Minority;" but the Petitioner forgets to tell, that the Person by whom they were mismanaged was her own Author, *George Cathbert of Castlehill*: He was one of *Plaidis's* Tutors and Curators; by him the Boy's Education was totally neglected; and it appears, from undoubted Evidence, that *Cathbert* took every possible Advantage of his Pupil, who was a facile, dissipated, inattentive Lad.

In this Way, by *Cathbert's* Mismanagement, as well as his own Facility, *Plaidis* is confessed to have been involved in great Difficulties, out of which it was impossible for him to extricate himself: on which *Robert Innes* of *Alnside*, and *Alexander Clark*, Baillie of *Inverness*, interposed for his Relief; and, by large Advances, they are acknowledged to have made, by which they kept him in a manner from starving, they are confessed to have become considerable Creditors to *Plaidis*; consequently, they were justly entitled to be reimbursed; and as it would not have been either for *Plaidis's* Interest, or for their Safety, that he should have had it in his Power to draw and squander the Money decreed to be paid by the Earl of *Cromarty* and *William Innes*, and his Friends were universally agreed, it was absolutely improper any longer to trust *Cathbert*, therefore he made over those two Debts, with the Lands of *West-Cumbie* (which had been also adjudged by the foresaid Decree, to those having Right to the two Apprisings above mentioned) to and in favour of his Benefactors, *Innes* and *Clark*.

In this view, two several Dispositions were executed by *Plaidis*, the one, dated the 21st of *October* 1729, the other, the 30th of *January* 1740, by which he disposed and made over in their favour the foresaid two Apprisings, and all he was entitled to in consequence thereof, by the above mentioned Decree of Division, viz. the Share of the Price of that Part of the Estate purchased by the Earl of *Cromarty*, and that decreed to be paid by *William Innes*, together with the Lands of *West-Cumbie*:—These Conveyances, made in favour of *Innes* and *Clark*, were, *ex facie*, absolute and irrevocable; but by Black bonds, of even Date, with the Dispositions, and reciting the same, *Innes* and *Clark* became bound to render an Account to *Plaidis*, his Heir and Assigns, of all Sums which they should recover by virtue of the said Dispositions; and

it was thereby provided, that, out of the first and readiest of the Monies, they should be allowed to retain in their own Hands, as much as would satisfy and pay them of all Debts and Sums of Money due by *Plaids*, or his Father, or Granduncle, Provost *Cuthbert*, which they either had already satisfied and cleared, or should thereafter satisfy and clear, with all Sums which they either had advanced, or should advance to *Plaids* himself; but, by the Back-bonds, it was specially provided, that they should be accountable for their actual Intromissions only.

On the Faith of the Security thereby granted, *Innes* and *Clark* are proved, by *Vouchers produced*, to have advanced and paid, for and on account of *Plaids*, Sums to a very considerable Extent.

For their Reimbursement, therefore, and in Prosecution of the Purpose for which the Conveyances were granted, they not only recovered the Sum of 1071 *l.* decerned to be paid by *William Innes*, but intimated the Dispositions above mentioned to the Earl of *Cromarty*, and made repeated Applications to his Lordship for Payment. These, however, proved ineffectual; on which they went the Length of giving in a Petition to this Court, praying for Registration of the Bond his Lordship had granted for the Price; but the Petition being appointed to be answered, the Earl pleaded Compensation, with several other Defences, and Execution was refused to be summarily awarded.

Thereafter *Innes* and *Clerk* made several other Attempts to settle Matters amicably with his Lordship, and actually entered into a Submission with him; but the Submission being shifted and delayed by his Lordship, came to nothing; and it appears that they even attempted a Reduction of his Counter-claims against *Plaids*, to pave the Way for recovering the Debt itself.

In this Way Matters were kept lying over for several Years, till *Alexander Clerk*; one of the Disponees, having been nominated executor to the deceased Mr. *Robert Frazer* Advocate, Sir *Patrick Dunbar*, the Respondent's Father, became Cautioner for him in the Confirmation, and he was thereafter decerned to pay very considerable Sums for *Clerk* on account of that Cautionry.

It is pretended in the Petition, that Sir *Patrick* never paid anything for *Clerk*; but the contrary is well known to the Petitioner himself; and a Decreet-arbitral, pronounced by the late Lord *Lebices*, stands upon Record, by which he was decerned to pay a very large Sum for him. *Clerk* did therefore, as he was in Justice bound

Oct. 21,
1719.

bound to do, dispone and make over to Sir Patrick Dunbar, his Heirs and Assignees, the two Apprisings aforesaid, and all following thereon, the Decreet of Division, and Sums thereby due, with the foresaid Lands of *West-Carrick*, and Maills and Duties thereof, from *Whitsunday* 1719.

November 14,
1715.

In this Manner Sir Patrick Dunbar acquired full Right to all the Interest Clerk had in the foresaid Debt, and as Clerk had been obliged to pay for *Innes* very large Sums, of which he was intitled to be relieved, these Clerk did also, by Assignment, of the same Date, make over to Sir Patrick, on which Sir Patrick obtained himself deemed Executor-creditor to *Innes* before the Commissary of *Meray*; and having charged *Jonathan Innes*, eldest Son and apparent Heir of the said *Robert Innes*, to enter Heir to his Father, he obtained a Decreet *cognitionis causæ* against the *hereditas jacens* of his Father, which was afterwards compleated by Decreet of Adjudication led against him at the Instance of the Respondents, as in the Right of Sir Patrick Dunbar.

February 1,
1722.

Sir Patrick Dunbar, the Respondent's Father, did directly intimate to the Earl of *Cromarty* both the Disposition and the Assignment above mentioned, granted in his favour, as appears from an Instrument of Intimation produced; and he proceeded to take other Steps for recovering the Money.

More particularly, in 1733, he entered into a Submission, to which *Cuthbill* was a Party, but the Earl, who had the Money to pay, endeavoured, as well as *Cuthbill*, to protract the Decision, and the Affairs of the Family of *Cromarty* having in the meantime gone into Disorder, Sir Patrick was prevented from recovering Payment, by the Attainder of the late Earl, on account of his Accession to the Rebellion 1745.

Sir Patrick was then an old Man, and lived in the remote County of *Cathness*. His Doer, the deceased Mr. *Ludovick Brodie*, is also known to have been greatly advanced in Years. Six Months after the Survey appointed to be made on that Occasion, were all the Time allowed to Creditors for entering their Claims on the forfeited Estates, and as no Notification of the Surveys was directed to be made in the publick News-papers, it was owing to that and the other Causes already suggested, that the six Months were elapsed before Sir Patrick and his Doer were apprised of the Survey, of which the Consequence was, that a Claim was neglected

to be entered on the forfeited Estate, for the foresaid Debt, in the Name of Sir *Patrick*.

But, besides a Claim, which was entered by *Margaret Cuthbert, Plaid's* Daughter, the Petitioner, *Mrs. Jean Hay*, (who by the bye was only assigned to the foresaid *Back-bonds* granted by *Innes* and *Clark*, and had therefore no more than a Right to the *Reversion* which should remain after clearing the Debts due to them) thinking to make Advantage of Mr. *Dunbar's* particular Situation, entered another Claim for the Money; but the Grounds necessary for supporting it, having been delivered to *Innes* and *Clerk*, were obliged to be recovered on a Diligence. It is pretended by the Petitioner, "that Sir *Patrick* suffered her to obtain a Judgment against the Crown, without interfering." If he had, the Consequence is not obvious, and the Respondents have offered to reimburse the Petitioner of any Expence necessarily disbursed in getting the Claim sustained. But the Allegedance is a Mistake: Sir *Patrick*, with his Doer, being cited on the said Diligence, did then assert his Right before the late Lord *Woodhall*, Ordinary appointed for discussing the Claims on the forfeited Estate of *Cromarty*, and his Lordship, by his Interlocutor, expressly reserved to Sir *Patrick*, notwithstanding his producing the Writs called for, all Right and Title which he had to the Subject then claimed by the Petitioner.

The Petitioner, acquiescing in that Interlocutor, proceeded to get her Claim sustained, and Sir *Patrick* was only prevented by Death from commencing an Action, which he was advised it was proper for him to do, for having it found and declared, by Decreet of this Court, against the Defender, *Mrs. Jane Hay*, that he had, on the Titles aforesaid, the prior and preferable Right to the Money, with the best and only Title to uplift, receive and discharge the same.

That Action, which he was prevented from instituting, the Respondent has now brought; and it is surprizing to find the Petitioner, after the Detail that has been given of the various Steps taken by *Innes* and *Clark*, as well as Sir *Patrick Dunbar*, and the very large Sums which they had the Generosity to advance for *Plaids*, adventuring to say, that *Innes* and *Clark* neglected his Affairs, squandered his Funds, and took no Step for recovering the Money; the contrary is well known to the Petitioner herself: The Accountant's Report, founded on Vouchers produced, ascertains the Sum due to the Respondent, to a very great Extent, and the Petitioner has

acquiesced in the Lord Ordinary's Interlocutor, approving of that Part of the Report. *Innes* and *Clark* had no Funds to squander; the only Funds, assigned to them, were the three above mentioned, viz. the 1071*l.* decreed to be paid by *William Innes*, the Debt due by the Earl of *Cromarty*, and the Lands of *West Canishy* worth no more than 300 Merks a Year. The first, which they recovered, was a Mite to the large Sums, which they are *proved* and found to have advanced: The second, being the Fund in question, remains confessedly *unapplied*, and, putting the utmost supposable Value on the Farm of *Canishy*, a large Balance remains confessedly due, much more than sufficient to exhaust the Debt sustained upon the Estate of *Cromarty*; so that *Innes* and *Clark* have clearly acted a most generous Part, and it cannot be doubted, that the large Advances, which they had the Generosity to make for *Phinds*, contributed not a little to throw their own Affairs into Disorder, as the Earl of *Cromarty*, by Ways and Means, disappointed them of the Fund, on the Faith and Expectation of which, they had been led unwarily to make those large Advances. And the Defender knows, that the Petition which *Innes* and *Clark* presented to this Court, with the Submission and other Steps taken by them, were used by herself to prove Interruption of Prescription, which was pleaded against her in behalf of the Crown.

The Grounds therefore do not appear, on which it can be said, that *Innes* and *Clark* abused the Trust reposed in them, or squandered the Effects of their Constituent; the contrary is apparent, and the Respondents are sorry to say they cannot view *Casshill's* Conduct in the same favourable Light. *George Cathbert*, Father of the Petitioner's Husband, was one of *Phinds's* Curators, indeed the chief Manager of his Affairs during his Minority: The gross Abuses therefore, admitted in the Petition to have been committed in the Management of the Minor's Affairs, must have proceeded from *Casshill* himself.

As *Casshill* had never rendered an Account of his Intrusions, and as his Management had been most gross, an Action of Count and Reckoning was therefore brought against him and the other Curators before the Court of Session; but *Casshill* was aware of the Consequences of the Action, and conscious of his Misadministration, had the Address previously to impetrate from *Phinds*, a Discharge of his Intrusions and of all Demands. The Principal has not been denied to be in *Casshill's* Hands, and a Copy, long ago

ago produced in Process, was subjoined for your Lordships Perusal, to Answers put in for the Respondent in *September 1766*.

The Discharge was taken and signed at *Inches*, an obscure Place of the Country, *remotis arbitris*, and without any Friend of the Minor's being present, or so much as acquainted with the Affair. It bears to be wrote by one *Donald Cuthbert*, *Castlehill's Inverness* Writer, and is only witnessed by him, and a Tenant of *Castlehill's*, and a School-boy, who could know nothing of the Matter. It is conceived in most anxious Terms, which show a *Consciousness* on the Part of *Castlehill*, yet no Copy of it was delivered to *Plaids*, no Account was instituted, nor were any Vouchers delivered, tho' it is therein said, that several Debts had been paid for *Plaids*, of which therefore the Vouchers fell to be given up to him.

Castlehill did not think fit to let this Discharge make its Appearance, till the Process of Count and Reckoning had depended for some time: None of the other Curators had ever seen or heard of, nor were they included in it, neither was it even surmised, before calling the Process, that such a Discharge had been granted.

However, soon after this, *John Cuthbert* of *Castlehill*, the Son of *George*, and Husband of the Petitioner, obtained from *Plaids* the Assignment in Process of the Back-bonds granted to him by *Innes* and *Clark*. 1713.

The Cause of granting this Assignment, as appears by *Castlehill's* Back-bond of even Date, is said to be in Security and Payment in the first place of the principal Sum of 4200 *l. Scots* and Interest, contained in a Bond of Corroboration, of Date the 21st of *November 1712*, by *Plaids* to old *Castlehill*, (which is excepted from the foresaid Discharge, and is of *even Date* with it,) and, in the next place, of certain other Debts, said to be due, partly to himself, partly to his Father, prior to the Date of the mutual Discharge.

John Cuthbert, conscious of the Advantage taken of *Plaids* in these Transactions, thought proper that the Assignment in his favour should be kept *latent*, and notwithstanding the Boasts made in the Petition, he did not for twenty Years take a single Step in the View for which the Petitioner pretends it was granted. The Assignment was not intimated, nor did it even make its Appearance till 1732, long after *Plaids* had been dead, on occasion of the Process, *Castlehill* thought proper then, for the first time, to raise against Sir *Patrick Dunbar* and the Earl of *Cromarty*, which shews he was well apprized he had neither a good Right to the Debt itself, nor any just Demand upon Sir *Patrick*
The

The Respondent shall only further observe, that none of the *Grants of Debt*, for Security and Payment of which this Assignment by *Plaint* to *Cashhill* is said to have been granted, have been produced by the Petitioner, and, notwithstanding that old *Cashhill*, the Father, was alive at the Time, yet the Assignment was taken to ~~for~~ the Son, the Petitioner's Husband, although he had no Right in his Person to the Debts, for Payment of which it appears to have been granted.

Upon the above State of the Fact, it is humbly submitted with what Grace or Justice the Petitioner can here pretend, that *Cashhill* interposed for *Plaint's* Behoof, or that the Respondent's Plea is unfavourable: *Cashhill's* Right was rotten from the Foundation, and the Assignment, lately taken by the Petitioner herself from *Plaint's* Daughter, at least does not mend Matters, because the only Value, pretended to be granted for it, is a *Promise* of 50 *l. Sterling*, to be paid by the Petitioner, *after Receipt* of the Monies from the Crown; a Consideration by no means adequate to the large Sums thereby acquired.

On the other hand, *Jones* and *Clark* are most onerous Creditors, *already proved* by the Vouchers produced, and *found* by the Lord Ordinary's *final Interlocutors* to be so, to a great Extent; so that it is improper what is said in the Petition, (Page 10.) "That the Respondent, in the Character of *Jones* and *Clark*, Trustees for *Plaint*, is wanting to take *Plaint's* Estate from him, and to make "it go in Payment of *their* Debts." The Debt, due by *Plaint* to *Jones* and *Clark*, with its Extent, is *already ascertained*, and it is but Justice that they, or their Assignee, get Payment of that Debt, *out of the very Fund* originally pledged and assigned to them for their Security and Payment.

The only Question therefore at present before your Lordships, is concerning the Articles, for which it is pretended Credit must be given to *Plaint*, or the Petitioner claiming in his Right.

Jones and *Clark* were expressly declared not to be liable for Omissions, but accountable for their actual Intrusions only, of which the Consequence is apparent, and the Petitioner was early sensible, that it was incumbent upon her to prove their Intrusions. In this View she applied to the Lord Ordinary, and was allowed Diligence after Diligence, during a Dependence, not of Weeks, but of Years, for the very Purpose of proving those Intrusions; and though it was certain that it would be impossible to prove any, yet

yet the utmost Indulgence was shown her by the Respondent, and she was allowed to examine every Mortal, whose Evidence she pretended could be of the least Service to her; the Result was, that she did not prove Intromission with a Farthing more than the Respondents had at the very Beginning of the Cause admitted; for the Respondents, who are singular Successors, and had no occasion to be personally acquainted with Transactions, that mostly happened before they were born, had no Access to know that the 1071 l. had been recovered from *William Innes*, but the Moment this appeared to have been the Fact, they admitted that that Sum should be charged against them.

And, in the Petition to be answered, the Petitioner, after having, in vain, exhibited to the Lord Ordinary, Representation after Representation, almost without Number, insisting upon various frivolous Grounds, does now insist before your Lordships upon three Articles, which shall be considered in their Order.

In the *first place*, the Petitioner (who has all along served up her Article 1st. Defences, as Articles of Credit, one after another, in a most dilatory Manner) prays your Lordships to find, that the Respondents can bring no Charge against her, till they either restore the Papers contained in the Inventories, mentioned in the Petition, or show what became of them, or account for the Sums it is said they ought to have received, in consequence of them.

It is surprising to find the Petitioner still proceeding in this Manner. These Inventories were not thought proper to be produced till the Cause had depended near three Years, for which the Petitioner finds it necessary to apologize, and says, the Respondents denied they existed. But some of them were never mentioned till they were produced; and it is a Mistake to say, "it appeared, from Writings in Process, that they had been delivered to the Trustees." Some other Papers had, indeed, been delivered to *Innes* and Clerk, but the *Inventory* did not fall to be delivered to them; it fell to be kept by *Plaids* himself: And the Fact is, that the Petitioner most unjustly, as well as strenuously, insisted, the Bond for 6000 Merks, mentioned in the Petition, should, *inter alia*, be charged against the Respondents, who, by a Variety of Circumstances, shewed it neither was nor could be one of the Subjects assigned or delivered to the Trustees. The Petitioner maintained the contrary would appear from the Inventories, in which she pretended it was contained, and which she did most positively

Q.

insist,

infist, *beheved to be in the Hands of the Respondent, or her Authors.* But, instead thereof, the Respondent, by clear Proofs, particularly by *Casslehill's* own Assignment, abovementioned, *acknowledging the Delivery and Receipt of it*, shewed said Inventory had actually been delivered to *Casslehill* himself, in 1713, and beheved therefore to be in the Custody of him, or the Petitioner, his Successor; so it is affected and groundless, what is now pretended by the Petitioner, (p. 11.) “ that the Way in which she came to have them among her Papers, was in consequence of certain Processes of Exhibition, and others, pretended to have been raised by *Margaret*, the Daughter of *Plaids*, against *Imes* and *Clark*.” The Way in which she got them is indisputable; and the Petitioner finding her Averment detected, at last popped out the Inventory, but, along with it, *for the first Time*, served up the Defence now pleaded, of which it is impossible to believe she can entertain any good Opinion, otherwise the Inventory, confessed to have been all along in her own Hands, would have made its Appearance earlier, and the only Purpose of bringing them out now, is to protract the Litigation, that she may, in the mean time, draw the Money from the Crown.

It is plain, from the Dispositions in their favour, that *Imes* and *Clark*, the Trustees, had Power to intromit with no other Funds than the three above mentioned, which were specially conveyed to them, and the Petitioner has no Title to call *Imes* and *Clark* to account for any Funds other than these, but, if she had, your Lordships would not think the Respondents bound, *per tantum tempus*, to account for a Parcel of Dust and old Lumber, not pretended to be worth Two-pence a Pound, unless the Petitioner could qualify some Damage arising to her from the Want of these Papers, which is not, however, pretended to be done.

The Papers contained in the first Inventory, do all clearly relate to the present Debt affecting the Estate of *Maj*: The most material of these were recovered by the Petitioner herself, on a Diligence, for supporting her Claim against the Crown, and as *this Debt* is still outstanding, it is evident no Claim can lie against the Respondents on this Score.

The Petitioner pretends some of those Writings do not relate to that Debt. But she has not established on a single Paper not connected with it: and if the Thing was not clear *abund*, from the Receipt subscribed to the Inventory, of even Date with the Disposition said to be granted in favour of the Trustees, the Presumption would be, that they did relate to it. Besides, if that had not been

been the Case, it does not appear that any of them were at all Debts due to *Plaids*, who was not then born ; and, from the Showing of the Inventory, they are clearly proved to be, at best, Clampers of an old Date, as far back as the Year 1678, nearly prescribed at the Date of the Inventory, as is the Receipt subjoined to the Inventory itself ; and it is not pretended, nor is there a Grue of Evidence adduced to show, that a Farthing was ever recovered upon any of them. That could not possibly be the Case, because they were not assigned to the Trustees ; consequently, what is said in the Petition cannot be presumed, that *Innes* and *Clark* recovered the Contents, unless the Papers or Bonds themselves be produced : *Innes* and *Clark* had no Right or Title to uplift, so could not recover ; and that the Writings were not specially assigned, is full Evidence nothing could be recovered upon them. Indeed, it does not even appear, that the Bonds mentioned in the Petition were granted for Sums of Money ; they might have been Bonds *ad facta præstanda* ; but if they were truly Debts, they behoved necessarily to come *in computo*, at settling the Extent of Provost *Cuthbert's* Interest in the Decreet, ranking the Creditors on the Estate of *Mey*, to which they were long prior, and related ; in which View the Petitioner, or her Authors, have already been allowed all they could claim upon them, as they were preferred and ranked for the Sum justly acclamable upon them.

But if nothing was or could be recovered upon them, the Demand, that the Papers themselves be produced, will not be listened to. The Receipt granted is long ago prescribed, and if they had been of any Use, it cannot be doubted, they would have been sought after long ago.

And though it were to be presumed, that any thing had actually been uplifted in consequence thereof, still it is impossible that any Charge could be made thereupon against the Respondents, as the Inventory, appealed to, specifies the Contents of none of the Bonds therein stated, or whether they were granted for Money or not.

With respect to the other Paper, which the Petitioner pretends to entitle, " Copy Inventory of *John Cuthbert's* Papers, sent to " *Monde to Edinburgh*, 5th July 1712," the Paper bears no such Title, and it is clearly not an Inventory, but only *Part* of an Inventory, perhaps a very small Part : It is mutilated, begins with the Word *Item*, and wants a Title ; the Quotation on the Back is plainly an *ex post facto* Operation, written by a different Hand, of which the Respondent knows nothing ; so it is impossible to say with Certainty, what was the Purpose for which the Papers were delivered

delivered to the Person who grants the Receipt ; at any rate, the Paper cannot possibly enter the present Question, because, according to the Petitioner's Showing, it is long posterior in Date to the Dispositions granted in favour of *Innes* and *Clark* ; the Receipt itself wants a Date, and is not pretended to be probative ; it does not even appear whether the Person, who signs it, was *Mondole* or not, and, at any rate, any Obligation upon that Receipt is long ago cut off by Prescription.

The Petitioner says, that Prescription cannot apply to the Case of a Count and Reckoning, for that so long as Action is competent to the Pursuers, the Documents of their Intromissions must remain in Force.

In the *first place*, the Respondents deny that Prescription cannot here take place. Compensation does not bar Prescription from running till it is proposed, so that Prescription may run against the Claim of one Party, at the same time that the Counter-claims, competent to the other, may be saved from it ; and the Respondent's Claims were saved by the various Documents above mentioned, taken by her Authors.

But, *2do*, It is plainly a begging of the Question to suppose, that these Papers were in the least connected with the Trust ; no such Thing appears from the Inventory, or from the Trust-disposition : On the contrary, from the Receipt thereto subjoined, it appears that they were given to *Robert Innes* several Years after the Date of the Trust-right, for some particular Purpose which cannot now be discovered, because the first Part of the Inventory is not produced, which being the Case, your Lordships can pay no regard to the Paper in the *mutilated State*, in which it has been produced by the Petitioner ; the Presumption, *post tantum temporis*, is, that these Writings were long ago returned, and it is by no Means improbable, all Circumstances considered, that a Discharge would have appeared on the Part now taken away, or at least, admitting what would have shown to Demonstration, the Petitioner was no wise interested in the Papers mentioned in the Inventory.

Indeed, it is pretty plain from the Inventory itself, that these Writings had no Connection with the Trust : The Receipt is not signed by *Innes* and *Clark*, but by one *Robert Innes* only ; and they are not Vouchers of Debt due to *Plands*, but Vouchers of Debts due to third Parties, perhaps by *Plands* himself ; therefore it is inconceivable what Loss the Petitioner can qualify by the Want of them.

But

But if they had been Debts due to *Plaids*, still no Charge could be reared upon them against the Respondents, for the Reason already mentioned, viz. That the Inventory does not specify the Contents of any of the Writings therein mentioned.

The second Point, on which the Petitioner insists, respects certain Houses in *Inverness*, with which she contends the Respondents ought to be charged, because, in the first Place, "there is an Article in the first Inventory, bearing *Affedations of umquhile John Cuthbert's Borough-lands in Inverness* : 2dly, There is an Article in *Innes's* Accounts, stated "for going to *Inverness*, and staying there for four Days, in order to sell John Cuthbert's Houses : " Lastly, It is said that *Innes* and *Clark* adjudged these Houses, and that they have not the Adjudication to produce, on which the Petitioner submits to your Lordships, if these Circumstances do not afford strong presumptive Evidence, that *Innes* and *Clark* sold these Houses, and it is sufficient to make them accountable for them." Article II.

This Article is indeed an extraordinary one : The Petitioner took many repeated Judgments of the Lord Ordinary upon it, and at last acquiesced in his Lordship's Judgments, particularly that of the 6th July 1768, ultimately as well as uniformly finding the Trustees could not be charged with those Houses : Yet she has now thought proper, in this Petition, to resume the Plea finally repelled.

But the Sale of Lands or other heretable Subjects, is a Thing, which cannot, in its own Nature, be presumed, and if it could, the Presumption would be unavailable, unless some Account could be given of the Price at which they were sold.

Indeed, the Circumstances, upon which the Petitioner founds, are totally irrelevant : An Intromission with Houses, is a strange sort of an Intromission, and it is not believed, that such Evidence as is here insisted on, was ever offered to a Court of Justice in any other Case, to show a Party had sold or disposed of Lands or Heretages, which can only be conveyed in a formal Manner, by written Titles. *Innes* and *Clark* neither did nor could sell those Houses, nor are they liable to account for them, because they were not disposed to them, and the only Title they had, was the Adjudication above mentioned, which was led for a very different Purpose, viz. for calling *Castlehill* himself to Account for his Intromissions with *Plaids's* Estate. *Castlehill*, during *Plaids's* Minority, had purchased

chased in a Variety of Rights and Adjudications affecting his Estate, which, in Law and Justice, ought to have accresced to his Pupil, but, instead thereof, *Castlebill*, taking Advantage of the Carelessness of *Phills*, made them a Handle for entering into Possession himself; particularly he entered into Possession of those Houses, uplifted the Mails and Duties of them, and, notwithstanding the repeated Averments made by the Respondents, the Petitioner has not once adventured to deny that those very Houses make Part of the Estate of *Castlebill*, and, as such, are under Sequestration in this Court at this Day, after which the Justice is submitted, with which the Petitioner can demand that *Innes* and *Clark*, or the Respondents, should be accountable for them.

That they are contained in their Adjudication, is of no Consequence: Every Adjudger both does and must adjudge the *whole* Estate belonging or supposed to belong to his Debtor, and if the Respondents were to be obliged to account for those Houses, because they were contained in the Adjudication, they would, in like Manner, be obliged to account not only for the whole Estate of *Mey*, but for this very Debt on *Cromarty*, confessed to be still outstanding, as well as all the other Particulars therein enumerated, which is absurd: Indeed, if any Consequence could be drawn from their being included in the *Respondents* Adjudication, the same Consequence behoved also to follow against the Petitioner, in whose Adjudications, from first to last, they are uniformly contained.

An Adjudger is not even presumed to enter into Possession, but the Fact must be proved: Much less therefore can it be presumed that he sold the Subjects adjudged: Heretable Subjects require to be transferred by written Titles, and their Progress can always be traced with Certainty, from the Records. Presumptions therefore cannot apply to them, but your Lordships have full Evidence, that *Castlebill* himself attained the Possession of these very Houses from the notable Discharge above mentioned, in which he took care to be specifically discharged of all *House-mails*, *House-rents*, *Shop-rents*, &c. thereby intending those very Houses in *Inverness*: Nor did he once adventure to charge or bring those Houses, or their Rents, into his Claims, entered on Ocaſion of the Process and Submission 1732, all which affords real and irresistable Evidence, that, instead of being ever possessed or intromitted with by the Trustees,

Trustees, *Caslehill* himself was the only Person who possessed or introritted with them.

The Article said to be stated in *Innes's* Accounts for going to *Inverness* in order to sell them, can never show that *Innes* and *Clark* did sell the Houses : The Reverse is rather the Consequence, because, if he had actually sold them, the Expence attending the Sale would have appeared in the Accounts.

In like Manner, it is impossible to infer any Thing concerning these Houses from the short Article stated in the improbative Scrap produced, concerning *the Affedations of umquhile, Mr. John Cuthbert's Bough-lands of Inverness*. No such Article occurs in the first Inventory, but it is contained in that *mutilated* Paper, which the Petitioner calls the *second* Inventory, and the Article itself might perhaps render it probable, that some Man of the Name of *Cuthbert* had a Tenement or House in *Inverness*, of which *Tacks had been set*, but could never import more, particularly could not infer any Conclusion against the Trustees, who are not mentioned in it, the rather, that the *John Cuthbert*, to whom the Article relates, could not be *Plaids*, because he is therein designed *umquhile Mr. John Cuthbert*, whereas *Cuthbert of Plaids*, who was *Innes* and *Clark's* Author, was alive at the Time to which that Inventory refers, and in the Paper itself, an Article occurs, dated in 1683, concerning the funeral Charges of *Mr. John Cuthbert*, stated *after* that of the Affedations, in the following Terms : " Item, Account of *Mr. John Cuthbert*, his funeral Charges " 1683."

The third Point submitted in the Petition, respects the Period Article III. from which the Respondents must be charged with the Rents of the Lands of *West-Canisby*, and the Petitioner prays your Lordships, to find that the Respondents must account for these Rents from 1694, at least from 1710. On this Point, the Respondents, with Submission, apprehend, that the Lord Ordinary's Interlocutors stand on clear and solid Grounds. By the Trust-rights, granted by *Plaids* in 1710, *Innes* and *Clark* are declared not to be liable for Omissions, but for *actual Introrissions* only, from whence it is clear, that they cannot be subjected farther than their Introrissions shall be either acknowledged or proved against them.

The Petitioner says, " That *Plaids*, in 1710, assigned *Innes* and " *Clark* to the Rents from *Whitsunday* 1694, which is good Evidence that *Plaids* had uplifted none himself; and as *Innes* and " *Clark*

“ *Clark* had a Right to enter on Possession, she argues, that it must
 “ be presumed they were in Possession *retro*, from the Date of their
 “ Right, especially as Sir *Patrick Dunbar*, their Assignee, afterwards attained Possession in 1719.”

But the Respondents will be pardoned to say, that they can discover no Principle in Law, upon which to establish such a Presumption. Possession, which is *facti*, admits of a clear and positive Proof, which it is incumbent on the Party who makes the Allegation to bring; and it is absurd to say, that it is incumbent on the Respondents to prove a Negative, *viz.* that they did not possess.

There is no room for legal Presumptions, in a Case in which they are expressly excluded by the Conception of the Deed itself: At least, the only legal Presumption, if it could be called one, that can be made, is, that Possession commenced at the Date at which it is acknowledged to have begun.

If *Innes* and *Clark* had been liable for Omissions, and so bound, either to have entered to the Possession, or to have assigned a Reason why, there might perhaps be room for presuming Possession *retro*; but when they are expressly exempted from being liable for Intromissions, as they might either possess or not, there is no room for presuming Possession against them: They are only liable for actual Intromissions; and the Extent thereof, as well as the Possession, must be proved. It is a Quibble, and almost unintelligible, what is said (Petition. p. 14th,) that, “ after it is proved and
 “ admitted, that, *de facto*, Possession followed upon the Right, that
 “ Proviso,” *i. e.* the Proviso declaring them liable for actual Intromissions only. “ can have no Influence in the Question, from what
 “ Period their Possession should be held to have commenced.”—
 After Possession has been once apprehended, the Continuance of it might perhaps be presumed, *in futurum*, for the Time subsequent *thereto*; but it not either admitted or proved, that *Innes* and *Clark* were ever in Possession, nor could Sir *Patrick Dunbar* possess before the 1719: And it is incomprehensible, what is said, that his Possession was their Possession: He was a singular Successor; nor was he bound to possess. And it is impossible to maintain, the Trustees can be obliged to account for the Rents, till it appear, by proper Evidence, that they entered to the Possession, which must hold here a *fortiori*; because there is no Evidence that *Clark* him-

self was in Possession, but great Reason to presume the contrary.

Indeed, much of the Petitioner's Argument is founded on a Mistake in Fact, that *Innes* and *Clark* were expressly assigned to the Rents from *Whitsunday* 1694; whereas the Assignment "bears no such Thing; and they are only assigned to the Rents, Mails, and Duties of the *foresaid* *hail* Lands (*i. e. the whole Estate of* *Mey*, contained in the Apprisings thereby conveyed) or all or any Part thereof, competent to the Disposer, or *Price or Annual-rents thereof aforesaid*, and that of all Years and Terms bygone, resting unpaid, and yearly and termly in Time coming;" which affords a Presumption, that *Plaids* himself was not then in Possession of the Subject.

Indeed, the Fact appears from the Decreet produced, that the Representatives of the Family of *Mey*, notwithstanding the judicial Sale made by your Lordships, continued to keep Possession of the Estate, nay, resisted the Purchasers on their attempting to enter into Possession, which was in those Days an easy Matter, as well as a common Thing in those remote Parts of the Country; and it appears from the Decreet of Ranking, that they would not even allow the Creditors, but opposed them in attempting to prove the Rental; and the Way in which they were obliged to prove it, was, by holding them confessed on a Rental given in for that Purpose. It cannot therefore be supposed, that *Innes* and *Clark*, who were Aliens in *Caithness*, could attain the Possession; but Sir *Patrick Dunbar*, a Man of Influence, possessed of a great Estate in the County, and its Representative in Parliament, found it a more easy Matter to make his Right effectual than any others could possibly do.

The Respondents cannot enter into the Observation made by the Petitioner, "That it is not to be presumed a Man would dispoſe to another a Subject of which he was not in Possession." This scarce deserves an Answer. Was *Plaids* in Possession of the Estate of *Mey*, or the present Debt found to affect it? Adjudications and other Rights, upon which *no Possession* has ever followed, are every Day transferred from hand to hand; and all which was here done, was, to make over all the *Right Innes* and *Clark* had. Right and Possession are Things totally distinct; and a Debtor, who is giving Security to his Creditor, must, and generally does, give him the

best he can, without enquiring whether all his Rights be well founded or not.

It is further said in the Petition, that though *Innes* and *Clark* had been assigned to the Rents from *Whitsunday* 1694, yet *Sir Patrick* is only assigned to them by *Clark* from *Whitsunday* 1719, which shows that *Clark* must have uplifted them; because, if they had been *in medio*, he would have assigned them to *Sir Patrick*.

In the *first place*, it has been already observed, that *Innes* and *Clark* were not assigned to the Rents from *Whitsunday* 1694, but, in general, *to the Rents bygone, and in Time coming*. 2dly, It would by no means follow, that, if the Rents were not *in medio*, they were therefore uplifted by *Clark*: there is Reason to presume, that neither *Plaidis* nor *Innes* and *Clark* ever attained Possession of the Subjects in *Caithness*, but the Possession might either be retained by *Mey* himself, or attained by others, whom the Respondents have had no Access to know; for, although they have lived chiefly in *Caithness*, yet they cannot be blamed for not being acquainted with Transactions, which, it is believed, happened before the Respondents were born.

And it cannot be inferred that *Innes* and *Clark* entered on Possession, because they were Creditors to *Plaidis*: A thousand Accidents or Inabilities might, notwithstanding, hinder them; and if the Argument was just, it would go the length of proving, or presuming, they had even recovered Payment of the present Debt, because it also was assigned to them, and for their Security too.

The Petitioner says, it is impossible for her to bring any Proof of the Possession, as all *Plaidis's* Papers and Vouchers were given up to his Trustees, and by them to *Sir Patrick Dunbar*; and she affects to be mighty ignorant about his Affairs.

But it is a Mistake that *all* his Papers were delivered to the Trustees. A few indeed were; and the Petitioner has had much better Access than the Respondents to be acquainted with the Transactions. It is clear, that the Evidences necessary for instructing the Possession, did not fall to be in the Hands either of *Plaidis* or of his Trustees: They fell to be in the Hands of the Persons who were in the natural Possession of the Lands. The Petitioner, therefore, does not suffer the least Inconvenience by any of *Plaidis's* Papers being delivered to his Trustees; and, whatever Difficulty may attend the
Proof,

Proof, that can be no Reason for fixing Intromissions on the Respondents *without Proof*, when, by the Trust-right, their Authors are expressly declared to be liable for actual Intromissions only. These, the Petitioner was all along sensible, she was herself bound to prove: In this View she applied to the Lord Ordinary for Diligence after Diligence, and she executed those Diligences in a manner against all the World, but she has proved nothing. It is not indeed believed, that she could have the least Expectations of proving further Intromissions than were immediately acknowledged by the Respondents; *res ipsa loquitur*, that there could be no further Intromissions; and the Diligences served little other Purpose than that of making a long Cause, and expensive Dependence. The Process was originally commenced in 1764, and the Lord Ordinary is well acquainted with the various Means, unnecessary to be mentioned, employed by the Petitioner for protracting the Decision; but it is humbly hoped your Lordships will have little Difficulty in refusing the present Petition, and adhering to his Lordship's Interlocutors.

In respect whereof, &c.

GEO. WALLACE.



December 15. 1769.

Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N
O F

ALEXANDER CUTHBERT, Esq;

Humbly sheweth,

THAT Alexander Cuthbert, provost of Inverness, died in 1681, possessed of subjects of considerable value; and particularly, of two decreets of apprising against Sir William Sinclair of Mey and Canisbie; the first dated 11th February 1664, and the other, 4th March 1676.

He was succeeded by his grandnephew John Cuthbert, afterwards designed of *Plaids*; who was served heir in special to his granduncle in certain burgage-tenements lying in and about the town of Inverness, when an infant, in 1702; but no title was ever made up in his person to the foresaid adjudications.

Sir William Sinclair having become bankrupt, his estate was brought to a judicial sale; and the most considerable part of it, being that situated in the shire of Ross, was purchased by George Viscount of Tarbet, afterwards Earl of Cromarty. A small part of the Caithness estate was purchased by William Innes writer to the signet, as trustee for John Sinclair of Ulbster. And, of this date, each purchaser obtained decret of sale in his favour.

July 28. 1694.

In February thereafter, a decret of ranking was pronounced in favour of the creditors, by which the heirs of Provost Cuthbert were preferred, on the price of the lands purchased by the Earl of

Feb. 21. 1695.

A

Cromarty,

Cromarty, for the sum of L. 5486 : 5 : 8 Scots, and on the price of the lands purchased by William Innes, for Sinclair of Ulbster, for the sum of L. 1075 : 12 : 4 Scots, with interest on both sums from Whitfunday 1694.

By the same decreet " there were adjudged, to the representatives " of Provost Cuthbert, the three penny three farthing and an half " o'clo land of the lands of Canisbie, holding of the King," &c. in payment of the remainder of the debt due to the Provost, as no purchaser appeared for these lands at the sale. And the decreet farther declares the provost's representatives to have right to the rents, mails, and duties, of these lands, from the term of Whitfunday 1694, and in time coming.

John Cuthbert, designed of *Plaids*, the provost's nearest heir, had the misfortune to have his affairs much neglected and mismanaged during his minority; and when he came of age, he was, from weakness of mind, and indolence of disposition, totally incapable of retrieving his situation.

In order to relieve himself from his difficulties, he committed the management of his affairs to Provost Alexander Clark in Inverness, and Robert Innes of Mondale.

To them he granted three several deeds, for the purpose of settling his affairs, and paying his debts. The first of these is a factory, dated 15th August 1709; the second, a disposition and assignation, 21st October 1709; the third is a more ample disposition, dated 30th January 1710, whereby, after reciting the two former dispositions, Plaids conveyed to the said Alexander Clark and Robert Innes, and their heirs and assignees, besides his other effects, the two apprisings of the estate of Mey, the decreet of ranking and sale, the sums and lands adjudged to the heirs of Provost Cuthbert by that decreet; and this disposition contains procuratory of resignation, and precept of seisin, together with an assignation to the mails and duties for bygones, and in time coming.

But as Plaids had never made up any title to these subjects, the trustees claimed from him a bond, of the same date with this last disposition, for 50,000 marks; and having thereupon charged him to enter him to his grandchildren, they, upon the 29th June 1710, obtained administration of the whole subjects and lands conveyed by the foresaid disposition.

Of even date with each of these deeds, backbonds were granted to John Cuthbert by Robert Innes and Alexander Clark, declaring the

the same to be trust-rights granted to them, for security of what sums they either had already, or should afterwards advance for the granter, together with the interest thereof; after deduction of which, they obliged themselves to become accountable for the remainder, to the said John Cuthbert, his heirs and assignees; in whose favour they also obliged themselves to denude.

Immediately after having obtained these dispositions, the trustees proceeded, with wonderful dispatch, to accomplish the great object *they* had in view; which was, the getting into their possession and management the whole subjects conveyed to them; and at the same time they took care to possess themselves of his whole papers.

The other more material object of their trust, the supporting Plaids himself, the paying his creditors, and the retrieving his affairs, they soon neglected. They seem to have been totally unworthy of the trust reposed in them; and their view was, not so much to serve poor Plaids, as to plunder his effects.

This unfortunate situation of Plaids occasioned regret to his friends, and produced complaints from his creditors. At last the petitioner's father, John Cuthbert of Castlehill, a very near relation and considerable creditor of Plaids, resolved to take some measures for securing the debts due to himself, and, if possible, to rescue the affairs of his friend from the hands of these trustees.

He accordingly, of this date, obtained from Plaids a conveyance July 17. 1712 to the subjects which had been before conveyed to Innes and Clark; and to the several backbonds granted by them, "with full power" to ask, crave, and obtain, just count, reckoning, and payment; "of the said Robert Innes and Mr Alexander Clark their intromission by virtue of the said disposition, in the terms of the said backbonds; and, if need be, to pursue therefor in his own name, and to hinder and impede any agreements with any of my debtors that may be made by them unfrugally, or to loss," &c.

Of the same date with this conveyance, Castlehill granted a backbond to Plaids, declaring the conveyance to be in security of the debts therein particularly mentioned, due to him by Plaids; and obliging himself to account for his intromissions, after deduction of these debts.

Innes and Clark were as incapable of good management as they had shown themselves of discharging their trust with honesty; and they both became bankrupt about the year 1719.

In

In that year, Clark having confirmed himself executor to one Mr Robert Frazer, he prevailed upon Patrick Dunbar of Bowermadden, afterwards Sir Patrick Dunbar of Northfield, to become his cautioner; and, for Sir Patrick's security, he, by a deed of this date, conveyed to him the various subjects which had been disposed to him and Innes by Plaids; and particularly among others the lands of Canisbie, to the rents of which he assigns him from the preceding term of Whitsunday 1719.

This right being incomplete as to one half, without a conveyance from Innes or his heirs, Sir Patrick Dunbar endeavoured to supply this defect in the best manner he was able. Discovering that Clark had paid up singly some of the bonds in which he and Innes had been jointly bound for Plaids, he immediately concluded Clark to be largely the creditor of Innes; and, without examining any farther, he immediately confirmed executor-creditor to Innes; and thereafter obtained a decret of constitution, *cognitionis causa*, against Jonathan Innes, the son and apparent heir of Mondale.

Sir Patrick himself proceeded no farther; but, after his death, in 1763, his daughter Elisabeth, in virtue of a general disposition from him, confirmed the sums in the said decret *cognitionis causa*; and thereupon, of this date, obtained an adjudication against Jonathan Innes, for the accumulate sum of L. 8808 Scots of Innes the trustee's half of the whole subjects acquired by him and Clark from Plaids.

Such has been the progress of the trust-right granted by Plaids to Innes and Clark. With respect to that granted to John Cuthbert of Castlehill, the petitioner's father, no material step was taken in consequence of it, till, in 1732, he brought processes against Innes and Clark, the Earl of Cromarty, and likewise Sir Patrick Dunbar, who long before this time had got possession of the lands of Canisbie. In 1733, Castlehill's death stopped the process; and soon after, Sir Patrick Dunbar, and Castlehill's heir George Cuthbert, agreed to submit their claims to arbitration; but it does not appear, that in consequence of this submission any thing material was done.

John Cuthbert of Castlehill had, in 1729, execute, in favour of his wife Mrs Jean Hay, a general disposition of all his subjects, for certain purposes therein particularly specified. She, in order to complete her right to these subjects, obtained, July 3, 1754, a decret

creet of adjudication in implement, against her husband's heir, adjudging from him the several subjects of which his estate consisted; and, in particular, the lands of West Canisbie, and the sums for which Plaids was ranked by the decreet of ranking and sale of the estate of Sinclair of Mey.

In 1749, the said Mrs Jean Hay entered a claim for herself and children, upon the forfeited estate of Cromarty, for payment of the sum of L. 5486:5:8 Scots; for which, by the decreet of ranking in 1695, the heirs of Provost Cuthbert had been ranked upon the estate purchased by the Earl of Cromarty.

In discussing this claim, it was moved as an objection on the part of the crown, That the claimant had not produced the original grounds of her claim. To remove this objection, Mrs Jean Hay obtained a diligence against Sir Patrick Dunbar, and his agents, for recovering the papers necessary for supporting her claim, and which had been put into his hands by Innes and Clark. And accordingly these papers were exhibited upon oath, by Sir Patrick's agent, in the clerk's hands.

About the same time, the said Mrs Jean Hay acquired from Margaret Cuthbert, only daughter and heir of John Cuthbert of Plaids, a disposition to all lands, heritages, and other rights which had belonged to her father; and particularly this claim on the estate of Mey, together with a ratification of all rights granted by her father to Cuthbert of Castlehill.

After a very tedious and expensive litigation with the crown, the claimant prevailed, and had her claim sustained by the unanimous judgement of your Lordships on the 29th July 1762.

After Sir Patrick Dunbar had thus allowed the said Mrs Jean Hay to prosecute, and at length to prevail in her claim, it was not expected, that either he, or any deriving right from him, would have endeavoured to come in, and reap the fruits of her labour. Notwithstanding, however, Elisabeth, his daughter and heir, thought proper, upon the conveyance as above set forth, to commence a process against the said Mrs Jean Hay, and the officers of state, in order to have it found and declared, That she has the preferable right to the aforesaid debt upon the estate of Cromarty; and that therefore Mrs Jean Hay should be obliged to denude in her favour of that claim, and the decreet of your Lordships sustaining it.

This cause came, in the course of the rolls, before the Lord Gardenston Ordinary in 1764; when the pursuer alledged, That

Innes and Clark had advanced sums for Plaids, which, with interest to that date, would amount to L. 30,000 Scots. But, at the same time, as she did not in her account give credit for any one article of the intromissions of her or her authors with the effects of Plaids, the Lord Ordinary, by an interlocutor of this date, " ordained the pursuer, against next calling, to give in an account of her author's intromissions with the effects of John Cuthbert."

Nov. 24. 1768

The pursuer inherited too much of the spirit of the original trustees to comply with this interlocutor. She was extremely attentive to seize upon every fund she could lay hold of, but slow and unwilling to render any account of her intromissions. She pretended to obey the appointment of the Lord Ordinary, by a paper, intituled, *A Confession*; but which was vague and evasive to the last degree: she pretended, that she was a singular successor, and knew nothing of any intromissions whatever, further than that she heard her father, Sir Patrick Dunbar, got possession of the lands of Canisbie in the 1719. She soon resorted to a plea more suitable to her *true* plan, and maintained, That before entering into any count and reckoning, Mrs Jean Hay should, in the first place, denude in her favour of the decreet sustaining the claim upon the estate of Cromarty.

It is unnecessary to trouble your Lordships with a detail of the litigation upon this point. It is sufficient to observe, that the plea of the pursuer was over ruled, first by the Lord Ordinary, and afterwards by your Lordships; and it became an established point, That she could not oblige Mrs Jean Hay to denude, any farther than she should be able to instruct Innes and Clark, the original trustees, to have been creditors of Plaids.

After this point had been fixed, the pursuer exhibited an account of the sums said to have been advanced for Plaids by Innes and Clark; but, at the same time, adhering to her original plan, she thought proper not to charge herself with any intromissions, and to maintain, that it was incumbent upon the defender to prove these; and, upon these principles, would have had the cause remitted to an accountant.

The Lord Ordinary remitted to Ludovick Grant accountant, to hear parties doers, and report upon the whole cause.

The accountant made his report; against which objections were offered:

offered : but the Lord Ordinary repelled these, and his judgement was afterwards affirmed by your Lordships.

Three questions were stated by the accountant for the Lord Ordinary's opinion. These respected the lands of Canisbie; which, as has been above narrated, were adjudged to Plaids by the decret of ranking of the creditors of Mey in 1694; and which decret, with all right following thereon, was conveyed to Innes and Clark in 1709 and 1710. As Plaids himself, by these conveyances, assigned the trustees to all the bygone mails and duties, the question occurred, *1mo*, From what period was the pursuer to be charged with the lands of Canisbie; whether from 1694, the commencement of the right of Plaids himself; or from 1709, the date of the trust-conveyance to Clark and Innes; or from 1719, the date of the possession of Sir Patrick Dunbar? *2dly*, It occurred as a question, At what rate the victual was to be converted in accounting? and, *3dly*, In what manner the value of the lands was to be ascertained, and accounted for?

Upon advising memorials upon these points, the Lord Ordinary July 14. 1768. pronounced the following interlocutor. "The Lord Ordinary having considered the memorials for both parties, finds, That the pursuers are only obliged to account for the rents of the lands of Canisbie from Whitsunday 1719, in respect the defender offers no proof of an earlier possession by Innes and Clark, the original trustees, and shows no sufficient cause for resting upon bare presumptions of an earlier possession: Finds, That the victual-rent must be converted at the rate of the fiars, unless the defender will undertake to prove the current prices of victual for the several years in question: Finds, That the conveyance from Innes and Clark to Sir Patrick Dunbar imported only a right in security; and therefore there is no room for determining the third question proposed by the accountant, viz. In what manner the value of the said lands is to be ascertained, and accounted for?"

After some litigation, the first branch of this interlocutor, which was the only part of it contested, was, of this date, finally adhered to by your Lordships. Jan. 25. 1769.

About this time, the petitioner Alexander Cuthbert, the third son of John Cuthbert of Castlehill, produced in process, a conveyance made to him by his mother Mrs Jean Hay, of the said decret, sustaining her claim upon the estate of Cromarty. Thereafter

Thereafter he prayed the Lord Ordinary to allow him to prove *prout de jure*, that Innes and Clark possessed the lands of Canisbie, and intromitted with the rents, prior to Whitsunday 1719; and upon advising a condescendence and answers, his Lordship allowed the proof demanded, and the pursuer a conjunct probation. In consequence thereof, an act and commission was extracted, and a proof taken and reported; and the Lord Ordinary, upon the 30th June 1769, made a visandum to himself with the proof, without any memorials. Thereafter he, on this date, pronounced the following interlocutor: "Having considered the condescendence and answers, together with the proof adduced, finds, That the defenders have not brought any sufficient evidence to prove or instruct, that Innes and Clark had possession of the lands of West Canisbie prior to their disposition in favour of Sir Patrick Dunbar 1769, (instead of 1719), and authorises the accountant to make up the state of accounts accordingly."

Against this interlocutor the petitioner offered a representation. Innes and Clark, the original trustees, after their obtaining the disposition 1709, employed William Campbell sheriff-clerk of Caithness to uplift for them the rents of Canisbie. From the representatives of this Campbell, the petitioner expected to recover documents to prove the possession of the trustees; but, unfortunately, the representative of Campbell died just before leading the proof; and as he had left an infant-heir, without tutors and curators, and his papers remained sealed up, the petitioner could not possibly obtain inspection of them. The petitioner therefore prayed the Lord Ordinary, that if he should still entertain difficulties as to the sufficiency of the proof brought, he would at least grant a warrant to the sheriff depute or substitute of the county of Caithness, or to any other proper person, to search the papers of the deceased William Campbell, and to lodge in process his account-book, or any other writing that may instruct his having uplifted the rents of Canisbie previous to the year 1719.

The Lord Ordinary appointed this representation to be answered; and after answers had been given in, the petitioner had an order to reply. But there having been accidentally discovered an inventory of papers in the possession of the pursuer's deer, among which there appeared to be several which the petitioner apprehends might aid his proof of the possession of the trustees prior to 1719, he therefore intimated the case, and prayed the Lord Ordinary would ap-

point

point the pursuer's doer to give inspection of such of these papers as should be pointed out. His Lordship appointed a condescendence to be given in of the writings called for; and this condescendence was immediately prepared, and sent to the pursuer's doer. He refused, however, to produce these writings; and therefore a representation was given in to the Lord Ordinary upon the 5th August last, praying he would appoint the pursuer's doer, either to give inspection of these writings, or to shew cause why he should not. Without any allowance from the Lord Ordinary, there was immediately given in an unsigned memorial, filled with clamour and misrepresentations, and stating objections to the petitioner's demand. The Lord Ordinary, of this date, pro-Aug. 10. 1769
nounced the following interlocutor: "Having considered the representation, with the memorial for Mrs Dunbar and husband, "refuses the desire of the representation, and adheres to the former interlocutor."

This interlocutor of the Lord Ordinary not only refused the representation, as to the inspection of papers demanded; but farther, by the former interlocutor adhered to, could only be understood his Lordship's interlocutor upon the merits of the cause. The petitioner was at some loss to apprehend his Lordship's meaning; the more especially as he had been allowed to reply to the pursuer's answers to his representation against the interlocutors of the 30th June and 7th July; and that this question, as to the inspection of papers demanded, fell necessarily to be determined before giving in such reply; and therefore he immediately gave in a representation, praying the interlocutor to be altered or explained, and that he might be allowed to give in the replies. The Lord Ordinary, 11th August 1769, appointed the representation to be an-Aug. 11. 1769
swered; but upon advising it, with answers, he, upon the 21st November, refused it, and adhered to his former interlocutors of Nov. 21. 1769
the 30th June and 7th July; and upon advising another representation, with answers, he again, of this date, adhered. Dec. 1. 1769.

These interlocutors of the Lord Ordinary, the petitioner must humbly submit to your Lordships review; and, after the full detail of facts above given, he shall endeavour to confine his argument within as narrow bounds as possible.

Before entering upon the particular points at present in dispute, the petitioner must observe in general, that a plea more unfavourable than that of the pursuer can hardly occur. Innes and Clerk,

the original trustees, betrayed the trust reposed in them, mismanaged the affairs, and plundered the effects of the poor weak gentleman, who had confided in them. Whatever sums it may be now pretended they paid for him, however difficult it may be at this great distance of time to prove their intromission with many of his funds, certain it is, that, according to the universal belief of that country, these trustees were, in the very first four years of their possession, more than indemnified for every shilling which they had laid out upon account of Plaids. This belief of the country at length reached the ears of the poor weak man Plaids himself, and occasioned the trust-disposition to his friend and relation Castlehill in 1713. Castlehill was himself a considerable creditor; and other creditors seeing no prospect of payment from the original trustees Innes and Clark, conveyed to him their grounds of debt. In the right of Castlehill came the petitioner's mother, entered the claim upon the forfeited estate of Cromarty, and at length, after a long litigation, prevailed in it. If she had not entered this claim within the time limited by act of parliament, it would have been lost for ever; for the pursuer neglected it altogether: if she had failed in getting it sustained, she never would have recovered from the pursuer a single penny for all her trouble and expence: but because she has prevailed in it, the pursuer would now reap the fruits of another's labour, and snatch away the gain which she did not contribute to acquire.

Another general observation to be made, is with respect to the unequal situation of the pursuer and defender, in bringing evidence with regard to the transactions of so remote a period. The original trustees, together with the effects, took possession of the whole papers of Plaids; and these came afterwards into the possession of the pursuer's father Sir Patrick Dunbar. Thus the pursuer is possessed of materials, from which she finds no difficulty in rearing up claims; but she will not give credit for a single penny of intromissions, although she cannot, from the nature of the thing, be ignorant of these. The defender, on the other hand, who never possessed either any of the funds or papers of Plaids, has now, at the distance of threescore years, to seek about for evidence, hardly possible to be obtained.

The pursuer may deny intromissions as she pleases, and may insist, that she can be charged with none but such as are proved against her by the defender. To show, however, how little her assertions

fections are to be trusted, mentioning one particular will be sufficient. By the decret of ranking of the creditors of Mey, it has been mentioned, that the heirs of Provost Cuthbert were ranked on the price of the lands purchased by William Innes for Sinclair of Ulbster, for the sum of L. 1075 : 12 : 4 Scots, with the interest thereof from Whitsunday 1694. As Innes and Clark had uplifted this sum in 1710, the petitioner insisted, that the pursuer should be charged therewith. This the pursuer most violently opposed, denying with great confidence the intromission of Innes and Clark therewith, till at last the petitioner had the good fortune to discover the conveyance of this debt, by Innes and Clark, to the purchaser Sinclair of Ulbster, upon payment, dated 6th and 24th November 1710. By the accidental circumstance of the doer for Sinclair of Ulbster having been at the same time doer for the petitioner, the assignation was luckily discovered, and the pursuers obliged at last to succumb as to this article.

In the same manner, and with equal confidence, the pursuer has denied the trustees possession of the lands of Canisbie, for any period whatever preceding Sir Patrick Dunbar's entry at Whitsunday 1719.

But notwithstanding the disadvantages under which the petitioner labours in proving facts of so old a date, he humbly apprehends he has brought evidence sufficient to satisfy your Lordships, that Innes and Clark, the original trustees, or others in their right, had such possession. That they were in possession preceding 1719, the petitioner apprehends to be established beyond a doubt; and he humbly hopes to satisfy your Lordships that they intromitted with these rents from the 1694 downwards.

Direct evidence by witnesses, of an intromission preceding fifty years ago, can hardly be expected, especially where the party intromitting was not in the natural possession. Your Lordships will therefore listen to that kind of evidence which the nature of the thing will admit. Circumstantiate evidence is in many cases as convincing as the direct testimony of witnesses. Partly by direct evidence, both parole and written, partly from a variety of circumstances, the petitioner hopes to satisfy your Lordships, that the pursuer's authors intromitted with the rents of the lands of Canisbie from the year 1694; and if so, she must of consequence be chargeable with these rents.

And,

And, in the *first* place, As these lands were adjudged to the representatives of Provost Cuthbert by the decret 1695, and they were assigned to the rents from the term of Whitsunday 1694, it must follow, that either, *1mo*, the heirs of Provost Cuthbert entered into possession, and uplifted the rents; or, *2do*, Sinclair of Mey continued in possession; or, *3tio*, the tenants possessed without paying any rent; or, *lastly*, Innes and Clark entered into possession in consequence of the factory and conveyances 1709 and 1710, and uplifted the rents due from 1694.

As to the *first*, it seems extremely clear that Plaids himself, the heir of Provost Cuthbert, never entered into possession of these lands. Provost Cuthbert, the original creditor, and adjudger of the estate of Mey, died in 1681, fourteen years before the date of the decret of ranking. By that decret *his heirs or representatives* in general are preferred in his place, without mention of any particular person. The Provost's nearest heir was his grand-nephew, John Cuthbert of Plaids, who was a minor for many years after his grand-uncle's death. His affairs were neglected during his minority. When he came of age, he was weak, indolent, and imprudent, and he never made up in his person a title to any of the subjects adjudged to Provost Cuthbert's representatives by the aforesaid decret of ranking and division, without which it is not very probable, that, upon so remote an apparency, he should have attained possession of lands, in the distant county of Caithness.

Plaids never even made an attempt towards getting possession of any of these funds. They were, *1mo*, The sum due by the Earl of Cromarty for the lands purchased by him; *2do*, The sum due by Sinclair of Ulbster for the lands which he purchased; and, *3tio*, The lands of Canisbie.

That Plaids never attempted to get possession of the two first, is put beyond a doubt by an original petition produced in process, which was presented to the court of session in July 1710, in the name of John Cuthbert, in order to have the bond granted by the Earl of Cromarty, and that granted by William Innes for Sinclair of Ulbster, registrate, as no payment had been made by either of them. The original answers to this petition are likewise produced; and the principal objection made to the demand of Plaids is, That the respondents did not know any thing of his right to Provost Cuthbert's adjudication, and that he had produced no title to convey the debts to the several purchasers upon payment. The petition

was accordingly refused. This application, your Lordships will observe, was made by Innes and Clark in the name of Plaids, so it is plain that the poor gentleman himself had never thought of taking any such step.

If he made no attempt to get payment of the debts due by the other purchasers of the estate, it is by no means probable, that he would be so active as to get possession of the lands of Canisbie, in the remote county of Caithness, with which he had no connection.

It has been observed, that the first deed granted by Plaids to Innes and Clark was a factory dated 15th August 1709, which is in process, and specially impowers his trustees to intronit "with all" debts, sums of money whatsoever, and others, any manner of "way due and addebted to me, whether heritable, real, or moveable, by a noble and potent Earl, George Earl of Cromarty, Sir James Sinclair of Mey, and the tenants and possessors of the lands of EASTER Canisbie, sometime belonging to the said Sir James Sinclair." By the decret 1694, there were adjudged to the heirs of Provost Cuthbert, the lands of Canisbie *holding of the crown*, which distinguish them from the lands of *East Canisbie*, which held of the bishop of Caithness. So ignorant however was Plaids in 1709, whether the lands adjudged to him were *East* or *West Canisbie*, that, in the factory just now quoted, he calls them the lands of *East Canisbie*. The trustees soon informed themselves better; for in their adjudication upon the trust-bond 1710, these lands are specially denominated the lands of *West Canisbie*, which is their true description. Besides this circumstance, the above-recited clause of the factory seems plainly to import, that Plaids himself had never recovered the bygone rents of these lands, and that he was even uncertain whether they were in the natural possession of Sir James Sinclair himself, or in the possession of tenants. If he had ever uplifted any of the rents, he would have probably mentioned in this factory the particular period from which he authorised his trustees to receive them. He mentions them however in general, and puts them in the same class with the debts due by Lord Cromarty and Ulbster, which it has been shewn had not then been paid.

Joining therefore all these circumstances together, there seems good reason to conclude, that, in the 1709, Plaids had not entered into possession, or uplifted any of the rents of the lands of Canisbie.

209, There seems as much reason to conclude, that the family of Sinclair of Mey did not continue in possession of them after the decret of ranking and division. It is a well known fact, and will not be disputed, that the judicial sale of the estate of Mey was managed and conducted by the Earl of Cromarty, in concert with the family of Mey, with which he was nearly connected. Immediately after the purchase, the Earl reconveyed to the family the greatest part of the Caithness estate, under a strict entail, under which they possess to the present day. As therefore the sale was a measure concerted for the benefit of the family, and as they willingly gave up the lands of West Canisbie, in extinction of the balance of Provost Cutlibert's debt, without any such demand being made, it is by no means likely, that they would withhold the possession from the persons to whom the lands were adjudged. And further, to show that the tenants could not be obliged to pay to any other persons than those having right by the decret of ranking and division, a process of multiple-poining which was brought by the tenants is repeated in the process of sale and division, conjoined therewith, and decret pronounced therein accordingly.

310, That the tenants themselves did not pocket the rents, but that they paid the arrears to those having right to demand them, seems sufficiently proved by the following circumstance. There are in process two bills drawn upon two of the tenants, in 1718 and 1719, by a person acting for Clark, one of the trustees: and at the same time it appears from the decret of division, in process, that these two tenants were possessors in the years 1694 and 1695. It cannot therefore be supposed, that these very tenants would have been allowed to continue in possession, if they had not paid up the bygone rents.

310, If John Plaid himself never got possession, if the family of Mey did not continue in possession, and if the tenants did not pocket the rents, the unavoidable conclusion is, that the rents must have been paid to James and Clark, in consequence of their conveyance from Plaid. The matter however does not rest here, but is confirmed by further evidence.

James and Clark were sufficiently alert in getting into their possession every bond belonging to Plaid. In 1710, your Lordship's first man petitioning the court of Session, to have Lord Cromarty's bond, and William James's bond, registered. When they failed in this,

this, because Plaids had no title in his person, they, with all dispatch, proceed; and upon a trust-bond for 50,000 merks, adjudge from him his whole subjects. So early as the 6th and 24th November 1710, they get payment of the sum due by William Innes and Sinclair of Ulbster, as is established by evidence in process; and the title by which they conveyed that debt to the purchaser, with consent of Plaids, was the adjudication on his trust-bond, in July preceding. There were various circumstances, unnecessary to be mentioned, which, notwithstanding some attempts made to that purpose, prevented their getting payment of Lord Cromarty's debt, before they themselves became bankrupt in 1719; particularly, certain large claims of compensation founded on by his Lordship; but their anxiety to recover payment is sufficiently evidenced by several circumstances, and particularly, by their petitioning the court to have his bond registrate. When such was their conduct, it seems most unreasonable to suppose, that they would delay a moment taking possession of the lands of Canisbie, in the close neighbourhood of which resided Sir Robert Dunbar, who was brother-in-law to Provost Clark, and the father of Sir Patrick Dunbar. If they would attempt to shew, that their endeavour to get possession was unsuccessful, or if they would point out what other persons possessed, the force of these circumstances would be obviated. If either of these had been the case, the pursuer could be at no loss to instruct it; but when she does not pretend to point out any such evidence, the conclusion to be drawn is both certain and obvious.

In support of this train of circumstances, arising from real evidence in process, the petitioner shall next shortly lay before your Lordships the import of the proof that has been lately brought.

Upon searching the sheriff-court books of Caithness, the petitioner accidentally discovered some protested bills, which, in his humble apprehension, clearly instruct, that Clark, one of the trustees, intromitted with the rents of Canisbie before the year 1719.

1mo, There is the following bill, drawn by Alexander Frazer collector of the bishops rents of Caithness, and doer for Provost Clark, upon John Innes of Borlum. It is as follows.

“ S I R,

Thursd, 12th May 1719.

“ At fourteen days sight, pay to me Alexander Frazer collector
 “ of the bishops rents of Caithness, or order, at my house in
 “ Scrabster, the sum of L. 261 : 14 : 10 Scots money, value in

" your hands of me as the rents of *West Canisbie*, belonging to Pro-
 " *Clark*, for which you are an intromissione by my
 " order, and granted bill to Provost Clark at Martin-
 " mas last for the foresaid sum; for which you'll make thankful
 " payment, and oblige, Sir, your humble servant,
 " *To John Innes of Borlum.* ALEX. FRASER.
 " Accepts, JOHN INNES."

Innes of Borlum was son-in-law to the said Alexander Fraser;
 and it appears from the deposition of Jean Reid, who was his ser-
 vant for part of the year 1717, and the whole of the year 1718,
 " That Borlum came to Gills (a farm contiguous to West Canis-
 " bie) at Whitsunday 1717, and got the management of the lands
 " of West Canisbie from his father-in-law, Mr Fraser, collector of
 " the bishops rents, that he might have the services of the tenants
 " to work upon the farm of Gills."

As the bill just recited expressly bears to be for the rents of West
 Canisbie, belonging to Provost Clark, as it is dated 12th May 1719,
 and bears, that Mr Fraser had granted his bill to Provost Clark for
 the same sum at Martinmas preceding, it instructs, in the clearest
 manner, that Innes of Borlum had, by authority derived from Provost
 Clark, intromitted with these rents before Whitsunday 1719; be-
 sides, that the sum in the bill is much more than the pursuer admits
 to be one year's rent of these lands.

But, *2do*, There is still farther evidence, that Innes of Borlum
 uplifted the rents in 1717 and 1718. There is a protested bill,
 drawn by him upon William Dannel, farmer in West Canisbie,
 dated 7th July 1718, " for L. 7, 10 s. Scots money, with four bolls
 " two firlots bear, sufficient girmel-stuff; and that as the money
 " and victual rent, and the peat-money, due out of your occupa-
 " tion in West Canisbie." There is another protested bill, drawn
 by Innes upon Donald Williamson, farmer in West Canisbie, dated
 7th July 1718, " for L. 17 Scots money, with five bolls bear, being
 " the money and victual rents due by you out of your occupa-
 " tion in West Canisbie, with the peats for crop 1717." And in
 support of this, Jean Reid depones, " That she served Mr Innes of
 " Borlum at Gills for a part of the year 1717, and the whole of
 " the year 1718: That she uplifted the rent of the lands of West
 " Canisbie from the tenants thereof, for Borlum's behoof, one
 " of

Proof, p. 3. C.

— p. 4 A.
B. C.

— p. 5 F

" of these years ; but does not perfectly remember which of them."

Thus it is proved, that during the year 1717 and 1718, the rents of West Canisbie were uplifted by Innes of Borlum and Alexander Frazer, by authority from Provost Clark, the original trustee of Plaids. As the trustees are thus proved to have been in possession before the year 1719, from which time they will only admit their possession ; so it is apprehended, that they must, at any rate, be presumed to have been in possession from the date of their own right in 1709, and to have uplifted the rents due from 1694, unless they shall prove the precise time at which they attained possession, and the manner in which they failed to recover the rents due from 1694.

Before Innes of Borlum and Alexander Frazer uplifted these rents, they were uplifted by William Campbell, sheriff-clerk of Caithness, who lived at Thurso. Thus John Manson tenant in Seater, aged 70, depones, " That he remembers, before Sir Patrick Dunbar Proof, p. 1. F. entered into the possession of the lands of West Canisbie, these lands were for some time under the management of William Campbell, sheriff-clerk of Caithness, who lived at Thurso ; that is, the rents of these lands were uplifted by the said William Campbell for some years ; and for some other period, the rents of these lands were uplifted by Innes of Borlum, who then lived at Gills, a contiguous possession ; but which of these gentlemen uplifted the rents for the first period, or in what right they uplifted these rents, the deponent knows not ; only *he knows that these gentlemen were not considered as the proprietors of the lands ;* and the deponent heard at that time, and since, that these lands belonged to a gentleman in the south, called *Cuthbert*." This witness is not certain whether Innes of Borlum, or Clerk Campbell, uplifted the rents first. But that Campbell was the first factor, is sufficiently ascertained by the bills above mentioned, proving Innes to have uplifted the rents immediately before Sir Patrick Dunbar entered into possession.

Jean Reid depones, " That she heard, that Clerk Campbell up- — p. 3. D.
lifted the rents of the lands of West Canisbie before she came to the parish of Canisbie." And she mentions her coming there to have been in 1717.

George Mowat, tenant in West Canisbie, depones, " That he has lived in West Canisbie for these twenty-two years past : That he — p. 3. H.
E " had

" had an uncle, called *George Morrat*, who lived in West Canisbie,
 " with whom, and with some other old tenants who lived there, the
 " deponent has conversed. Depones, That he has heard these te-
 " nants say, that they paid their rents to Clerk Campbell in Thur-
 " so, before Sir Patrick Dunbar got possession of the lands of West
 " Canisbie; and that he has heard them say, Mr Campbell up-
 " lifted these rents *in consequence of powers from one Mr Clark of*
Inverness."

1791. p. 2. F. Mrs Margaret Sinclair, aged 84, depones, " That she remembers
 " to have heard, that the lands of West Canisbie *belonged to one*
 " *Provost Clark of Inverness*; but she knows not, nor has she
 " heard, who uplifted the rents of these lands. Depones, That
 " she does not think, nor did she ever hear, that these lands were
 " possessed by any of the Laids of Mey since the sale."

These witness's prove, that before Sir Patrick Dunbar entered in-
 to possession, the rents of West Canisbie were uplifted, first by
 Clerk Campbell, and then by Alexander Fraser, and Innes of Bor-
 lamm; that these persons were considered as acting for some person
 in the south; and that the country understood them to be acting
 for Provost Clark of Inverness, the trustee of Pitsligo; so that it is
 now put beyond a doubt, that the possession of Innes of Bor-
 lamm, one of these, was by his authority. The last witness suf-
 ficiently shows, that the family of Mey never possessed after the sale,
 especially when the circumstances of that sale, as a concerted mea-
 sure carried on by a friend of the family, are considered: and there-
 fore, upon the whole, although if the facts were recent, more con-
 vincing evidence might be expected; yet, considering the great
 difficulty attending an entire stranger's procuring evidence of a pos-
 session, at so distant a period, in so remote a county, where the pur-
 chaser and her connections have such power and influence, it is hoped
 what has been brought will prove satisfying. To show your Lord-
 ships the difficulty of getting evidence, John Manson depones,

— p. 2. B. " That none of the tenants who possessed West Canisbie before Sir
 " Patrick Dunbar entered into the possession thereof, or their chil-
 " dren, are now living, in far as the deponent knows."

If there is any doubt or uncertainty in the evidence, the
 petitioner submits it to your Lordships, whether the pursuer
 ought not rather to suffer thereby, who delayed prosecuting for
 this debt upon the estate of Crumarty, and after neglecting it for
 more than fifty years, and after allowing the petitioner and his au-

thors,

thors, by their diligence and attention, to recover it, would now endeavour to rob them of their just acquisition. Besides, if the conclusions drawn by the petitioner, from the evidence above stated, are erroneous, the pursuer can easily correct them; for it is impossible to believe that she, who is possessed of all the papers of Plaids, of her father Sir Patrick Dunbar, and of the original trustees, and herself and her connections always residing in the county of Caithness, and of considerable influence therein, cannot point out evidence of the precise period of their attaining possession of the lands of Canisbie.

And to all the evidence above stated, two other circumstances may be added, which merit attention. The first is, That when, in 1719, Provost Clark's affairs went into disorder, and that he was conveying to his friend Sir Patrick Dunbar every fund which he possibly could; it cannot be doubted, that if he had never entered into possession of Canisbie, or uplifted the rents, he would have conveyed his right to Sir Patrick in the same manner, and at least as broad, as it had been conveyed to himself by Cuthbert of Plaids. But although Plaids had assigned the trustees to the rents from 1694, yet Clark, like any other proprietor in possession, assigns Sir Patrick only to the rents from and after the term of Whitfunday in that current year 1719, which affords irresistible evidence, when joined with the other circumstances of the case, that Clark was in the possession, and had uplifted the whole rents to that period.

The other circumstance which, in the petitioner's apprehension, also merits consideration, is, That it appears, from the account and vouchers founded on by the pursuer, that the whole advances alleged to have been made by the trustees on Plaids's account, amounting to betwixt L. 8 and 9000 Scots, were all of them betwixt the 1709 and 1714, during the first three years of the trust. The trustees were in labouring circumstances, and both of them became insolvent before 1719: Is it not therefore most improbable, that persons in these circumstances would have made such considerable advances, which was no wise incumbent on them, without having their constituents funds in their hands? And yet if the pursuer's account of the matter was to be taken, these trustees never touched a pence of Plaids's money until the year 1719, that Sir Patrick Dunbar got possession of the farm of Canisbie. It is true, that their intromission with the debt affecting Ulbster's purchase in November 1710, before they made any advances under the trust, has now
been.

been clearly instructed; which in so far disproves their tale: but as that would not have exceeded L. 2000 Scots, they must still have been betwixt L. 6 and 7000 in advance, if the pursuer's account of the matter were true. But if, as the petitioner contends, they uplifted the bygone rents of Canisbie from 1694 to 1709, and continued the possession from thenceforward, their advance, if any, must have been extremely inconsiderable: and whether it is most probable, that persons in their situation should, without any necessity, have made so considerable an advance without any funds in their hands, or that they actually possessed themselves of a fund *in medio* which enabled them to make these advances, and which neither Plaids himself, nor any other person but themselves had any title to uplift, is humbly submitted.

The petitioner has already intimated, that he expected to recover, from Clerk Campbell's papers, evidence to prove his uplifting the rents of West Canisbie, by authority from Provost Clark, before the year 1717. It has likewise been observed, that by the accident of the death of Clerk Campbell's representative at the very time of leading this proof, the petitioner was prevented from getting access to these papers, that gentleman having left an infant heir, without tutors or curators, and his papers having been sealed up. If, however, your Lordships shall think the evidence already brought, doubtful or insufficient, the petitioner humbly hopes, that you will grant warrant to the sheriff depute or substitute of the shire of Caithness, or any other proper person, to search for the account-books and papers of the said deceased William Campbell; and, in case he finds any there that may instruct Campbell's intromission with the lands of West Canisbie, on account of the trustees of Plaids, that he may lodge the same in process.

It was not till the very close of the vacation, with which the commission expired, that it was discovered, by the accident of the foresaid protested bills found on record, that the above-mentioned Mr Fraser, collector of the bishops rents in Caithness, had any concern with Provost Clark, or the lands of Canisbie. As the petitioner, however, is informed that this Mr Fraser kept regular books, which are existing, and may be recovered on a diligence, it is likewise humbly hoped, that an opportunity will be also given to recover these, as well as to examine some other material witnesses that have
lately

lately come to knowledge, and on whom the petitioner is ready to condescend, if that shall be thought necessary.

The petitioner has also mentioned above, that there has been lately discovered an inventory of writings in the possession of David Lothian, doer for the pursuer, among which there appear several relative to Plaids himself, and to his trustees Innes and Clark, and which may tend to throw light upon the points now in controversy. Mr Lothian's objections against production of those writings now called for, are, *1mo*, That he has formerly in the cause deponed in general, That he is not possessed of any writings tending to instruct the trustees possession of the lands of West Canisbie; and, *2do*, That when he formerly deponed, the petitioner's doer was possessed of that inventory, and must be supposed to have kept it up for the purpose of after delay.

But, in answer to these objections, the petitioner must inform your Lordships, *1mo*, That his doer had neither seen nor knew of this inventory at the time of Mr Lothian's examination. This cause, upon the part of the petitioner, was first conducted by William Budge writer to the signet; and as he died during the dependence, it was not till very lately, that the agent now employed, got up the whole papers and scrolls relative to it. Mr Lothian's examination happened since the death of Mr Budge, and before the papers were got from Mr Budge's representative. *2do*, The petitioner is very far from suspecting that Mr Lothian has wilfully concealed any paper of consequence; but it cannot surely be any imputation on Mr Lothian's judgement, that he possibly may have mistaken or overlooked the import of these numerous writings, which, without directly instructing the possession of Innes and Clark, may throw light upon that dark management, by pointing out who were in possession. And, *3tio*, The petitioner has condescended on the papers which he desires to be produced; a list of them is subjoined to this petition for your Lordships perusal; and you will observe they all relate to the trustees, and to Innes of Borlum, who is proved to have been in possession by authority from Provost Clark. As, therefore, these papers seem so clearly to respect the points now in controversy, the petitioner cannot, with submission, discover that the pursuer has the least right to oppose the production.

The pursuer has, with extraordinary keenness, opposed both the demand of the inspection of Clerk Campbell's papers, and of those

in the hands of Mr Lothian. Her uniform plan has been, to keep matters in total darkness, to oppose every explication, and therefore to hurry on the cause, lest time should produce inconvenient discoveries. Her first attempt was, to get possession of the debt on Cromarty, without shewing herself a creditor at all. Having by your Lordships justice been defeated in that, she would now gain possession of it, by rearing up claims, without giving credit for a single penny of intrusions with the funds which she and her authors have so long possessed.

She has affected to complain loudly of the petitioner's conduct, and has once and again hinted her suspicions, that he protracts the cause till he shall have obtained payment of the debt upon the estate of Cromarty, that he may then remove with it out of the reach of the laws of this country. Such idle clamour cannot, however, impose upon your Lordships. The petitioner has good reason to believe, that, independent of this debt on the estate of Cromarty, if the lands of Canisbie were sold, and the price, with the bygone rents, applied in payment of the pursuer's claims, they would do more than extinguish every shilling which she can even demand. If that is the case, the present action is groundless and unjust; and the petitioner has therefore applied to the Lord Ordinary, praying he would appoint these lands to be sold by public roup, according to articles to be adjusted at his Lordship's sight. This matter is now under his Lordship's consideration, upon minutes of debate from both parties; and the petitioner has again and again offered to find unquestionable security to the pursuer, for whatever balance shall be found to remain due to her after the sale of the lands of Canisbie, and a fair count and reckoning.

The petitioner shall only trouble your Lordships with one other particular. At a calling of the cause, intended for no other purpose than getting avissandum made with the proof, the pursuer thought proper to set forth, That there was an article of L. 153 Scots paid to one John Colley per draught in his favour, dated 1st April 1711; which draught appears to have been produced in process, but is now amissing; and therefore craved the Lord Ordinary would authorise the accountant to state the same in the report as advanced by the pursuer's authors.

The petitioner was not aware of this demand, and was not prepared instantly to say, whether the bill or draught had ever appeared in process or not; whereupon the Lord Ordinary, of this date,

date, authorised the accountant to state the above-mentioned article June 30. 1769. in his report, as advanced by the pursuer's authors. The petitioner, upon afterwards discovering that such draught had never made its appearance in this process, represented against the interlocutor: but the Lord Ordinary adhered, 10th August, 21st November, and 1st December last. Of these interlocutors, therefore, the petitioner humbly prays your Lordships review,

It is now admitted upon the part of the pursuer, that the bill or draught in question never was produced in this process, although the Lord Ordinary's first interlocutor was obtained by means of that averment alone. But when obliged to give up that, the next pretence employed for supporting the interlocutor was, That in the proceedings in the submission in 1732, between Sir Patrick Dunbar and George Cuthbert of Castlehill, there is mention made of such a claim, and objections made to it on the part of George Cuthbert. But, in the *first* place, Your Lordships will be informed, that there does not appear any minute, federunt, or indeed any other step of procedure, under that submission. The pursuer has indeed produced the principal submission itself, with some scrolls or copies of papers, intitled, *Claims, Objections, and Answers*, for the several parties, in which mention is made of a draught said to be paid to John Collie by the trustees: but these writings are no wise authenticated; and it would be a little uncommon, to subject the petitioner in payment of a bill, because it is mentioned in such copies of papers in the other party's hands, who may probably have her own reasons for not producing the bill itself, if it was truly ever paid by her authors. *2dly*, It will be observed, that George Cuthbert, the party to the submission above mentioned, never was in the right of Plaids, nor in the right of Castlehill his father; for John Cuthbert of Castlehill, the father of George, conveyed to Mrs Jean Hay, the petitioner's mother, in the 1729, all right which he had in consequence of the trust-disposition from Plaids in 1713: so that his son George Cuthbert had no right to enter into any submission with regard to these matters; and consequently no proceedings in that submission can be admitted as evidence in the present question. *3tio*, The objection made to this bill by George Cuthbert, seems to have been, That it bore no receipt of the payment being made by the trustees or Sir Patrick Dunbar: and that it was not paid by them, seems in a good measure

measure instructed by a partial receipt to Robert Innes, mentioned in an inventory produced by the pursuers themselves. And indeed to sensible are the pursuers of the groundlessness of this article, that in their answer to the last representation, they expressly agreed to pass from it, in case the Lord Ordinary should have any difficulty.

May it therefore please your Lordships, to alter the interlocutors of the Lord Ordinary reclaimed against; and to find, 1mo, That there is sufficient evidence, that Innes and Clark, the original trustees of John Cathbert of Plaids, intrusted with the rents of the lands of West Canishie from Whitsonday 1673 to Whitsonday 1719; and that therefore the pursuer may be held accountable for these rents during that period, or at least from the year 1709 to Whitsonday 1719: or, 2do, In case of difficulty, to grant warrant to the sheriff depute or substitute of Caithness, or to any other person whom your Lordships shall think proper to appoint, to search the account books and papers of the deceased William Campbell, and in case any are found that may prove Clerk Campbell's intrusion with the rents of West Canishie, to lodge the same in process; and also to grant warrant for letters of incident diligence, for recovering the account books of the deceased Alexander Fraser, collector of the bishops rents in Caithness, or any other writings relative to his intrusion with the lands of Canishie, and for citing such witnesses for proving the fore-said intrusions as shall be consented on by the petitioner as lately come to knowledge. 3do To ordain David Latham, agent for the pursuer, to give inspection to the deers for the petitioner of the writings called for, a list of which is hereto subjoined. And, lastly, To find, That the bill of L. 153 Scots, said to have been paid to John Colley, cannot be admitted into the report of the accountant; in respect it was never produced in this process, and that no sufficient evidence is founded on to prove that it ever existed, or at least that it was paid by the trustees.

According to justice, &c.

ROB. CULLEN.

Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N

O F

A L E X A N D E R C U T H B E R T, Esq;

Humbly sheweth,

THAT in the question between the petitioner's mother, Mrs Jean Hay, and Mrs Elisabeth Dunbar, which has been several times before your Lordships, it was long ago fixed, that Mrs Elisabeth Dunbar could not oblige the petitioner's mother, in whose right he now is, to denude of the claim she had got sustained upon the estate of Cromarty, any further than she the pursuer should be able to instruct, that Innes and Clark, the original trustees, were creditors to Cuthbert of Plaids. That thereafter a count and reckoning ensued; which was remitted to an accountant, who made a partial report as to certain particulars. After which the Lord Ordinary found, "That the pursuer is only obliged to account for the rents of the lands of Canisbie from Whitsunday 1719, in respect the defender offers no proof of an earlier possession by Innes and Clark, the original trustees, and shows no sufficient cause for resting on bare presumptions of an earlier possession." And this interlocutor was, upon petition and answers, adhered to by your Lordships. July 14. 1768.

That the cause having come back to the Ordinary, the petitioner applied for and obtained a proof *prout de jure*, that Innes and Clark possessed the lands of Canisbie, and intromitted with the rents, prior to 1719; and, in consequence of that interlocutor, he has examined several witnesses, and produced several papers, to instruct that alledgeance; though, by an unavoidable accident, he

A

was

was prevented from having access to two papers which would have instructed it still more clearly. The representative of William Campbell sheriff-clerk of Caithness, who uplifted the rents of these lands for Innes and Clark prior to the 1719, having died just before leading the proof, and as he left an infant-heir, without tutors or curators, the petitioner could not possibly get inspection of his papers.

That the Lord Ordinary, upon considering the new proof adduced, was, however, of opinion, and found, That the defender had not brought any sufficient evidence to prove, that Innes and Clark had possession of the lands of West Canisbie prior to the 1719; and authorized the accountant to make up a state of accounts accordingly. And to this interlocutor his Lordship afterwards adhered by several interlocutors; which interlocutors the petitioner has brought under review, by a reclaiming bill, which will probably be moved to your Lordships along with this. And as in that reclaiming bill the whole facts are fully explained, it will be improper to repeat them in this; the purpose of which is, to bring under review a separate and incidental point, determined by the Lord Ordinary after the above-mentioned interlocutors were pronounced.

That upon the Lord Ordinary's finding the new proof brought by the petitioner was not sufficient to instruct, that Innes and Clark had possessed the said lands prior to the 1719, the petitioner foresaw, that a further proof might be necessary for him, and that such proof would be attended with some delay and expence to both parties; therefore it occurred to the petitioner, that it would be a proper and prudent measure for all concerned, that the lands of Canisbie should be sold. These lands yield at least about L. 20 Sterling of old rent, that has never been raised; and on account of several particular circumstances, it is believed they would sell very high, and bring a sum that would do much more than pay the sum claimed by the pursuer Mrs Dunbar, in the right of Innes and Clark. If so, it is clear, that the pursuer would fail to have right to the price for her security, and would have no occasion to insist upon her present demand of the claim on the estate of Cromarty; and so expence and trouble would be saved to all concerned.

The petitioner with this view inrolled the cause before the Lord Ordinary; and insisted, That the pursuer, who is in the right of Innes and Clark, the trustees, should be ordained to expel these lands

lands to public roup in February next, upon proper articles of roup, to be adjusted at the sight of the Ordinary.

That the pursuer appeared by her counsel at this calling ; and admitted, that the petitioner's desire was reasonable ; that the step was proper and prudent ; and the fair way for getting full value for the lands was by public roup. And upon this the Lord Ordinary ordered minutes to be made up, that his authority might be interponed.

That when the minute came to be made up, the petitioner found the pursuer was disposed to retract ; and, on pretence that she did not chuse this cause should be embarrassed with a sale, refused her consent thereto.

That the petitioner having again inrolled the cause, the pursuer did retract her former agreement ; but, to give some colour to this extraordinary conduct, pretended that the sale would embarrass this process ; and, at the same time, made an offer of denuding, upon payment of what shall be ascertained to be due to her, after receiving the accountant's report ; or, upon the petitioner's lodging in process a conveyance to the debt on Cromarty to the extent of what shall appear to be due to Innes and Clark, she would *simul et semel* lodge a disposition in favour of the petitioner, with a right to the rents of the lands from Whitsunday next. To which it was answered for the petitioner, That it was not competent for the pursuer, to retract her former consent by her counsel at the bar ; and though it were competent, it was most unreasonable ; as, upon a fair sale, the price of the lands in question would far exceed the utmost balance pretended to be due : That the pursuer, who was in the right of the trustees, could not with any justice refuse her assent to a sale of one of the subjects conveyed to them in security, when called upon by the truster, or the person who is in his right, to do so ; which was the case here, the petitioner being in the right of Plaids : That as to any embarrassment or expence, the petitioner was willing to undertake the trouble and expence of advertising, and exposing the lands to sale, &c. ; all he wanted of the pursuer, being only to exhibit her consent thereto, and bind herself to denude in favour of a purchaser, the price being taken payable to her in security of what balance may be found due to her. And, in order to remove every possibility of objection or cavil, the petitioner was willing immediately to find undoubted caution to pay any balance that might be found due to the pursuer, over
and

and above the price of the said lands; for which reason she need give herself no trouble about the debt on the estate of Cromarty.

Dec 15-1769. That the Lord Ordinary, upon advising the minutes, pronounced the following interlocutor. " Finds, That the Ordinary has " no power *in hoc statu* to authorise the sale demanded; leaving to " the defenders to make application to the whole court for that " purpose, as they shall be advised." And this judgement the petitioner must submit to the review of your Lordships, without troubling the Lord Ordinary with a representation; that being improper, as the interlocutor proceeds upon a supposed want of power, and as another petition fell necessarily to be presented before this, and it would not be proper to divide the cause.

The justice of the petitioner's demand will be obvious to your Lordships at first sight. The petitioner is the truster, the pursuer is the trustee, in security of a debt due to her: can any thing then be more obviously just, than that the trustee should sell the subject impignorated, when required to do so? can any thing be more manifestly unjust, than for him to refuse, and endeavour to attach other subjects belonging to the truster, when he has already pledged to him a subject that will much more than extinguish the debt due to him, when sold? That is the case here; for by the accountant's report, the amount of the advances made by the pursuer's authors does not exceed L. 8000 Scots, without deducting any partial payments, or even the acknowledged intrusions from the 1719; but it is certain the lands will sell for double that sum. If they should fall short of the balance due, the petitioner has offered security for it: why then would the pursuer want to lay hold of another subject, when already undoubtedly secured by the subject in her hands, which in all probability will more than pay her debt; and, in case it should be deficient, caution is offered for the balance?

As to the offer, to denude upon payment of what shall be found due, after receiving the accountant's report, this is not very intelligible. The accountant has made no report as yet, except as to the advances by James and Clark; he has made no general report; nor can he make any such report, till every point in the cause is settled: so that this offer means nothing, as it is saying no more than that she will denude when she cannot help it, as it is not disputed that the petitioner has a veritable interest in the lands, and that the pursuer must denude when paid of all her demands.

As to the other offer, to denude instantly, upon getting a conveyance

veyance to the debt on Cromarty to the extent of what shall appear to be due her, this could have no effect, but to prevent either party from touching the money secured upon the estate of Cromarty, payment of which is expected to be ordered this session of parliament; and it is perfectly unreasonable, that the pursuer should be allowed to create any embarrassment upon this fund, as she has already in her hand a fund, that, in all probability, will more than pay her; or in case it should be deficient, has undoubted security offered her for the balance: so that it is palpable she has not the least reason or pretext for wanting to embarrass this debt, which the petitioner has secured on the estate of Cromarty.

The petitioner takes it to be clear, and founded both in law and equity, that a creditor who has a subject pledged to him by his debtor, cannot refuse his concurrence in bringing that subject to its proper avail, when required by the debtor to do so; more especially when he is offered the price of that subject in payment of his debt, and security to pay the balance when ascertained, if the price of the subject sold does not do so. Compensation is certainly a good defence against any creditor. If he has a subject in pledge, that subject is certainly worth something; and the only objection to pleading and sustaining compensation on that subject is, that it is not liquid: but that objection is removed by the instant liquidation offered upon a sale; and if the creditor wantonly or maliciously refuses his consent and concurrence to that liquidation, he can draw no objection from the want of it; he must be barred *personali exceptione* from doing so; and the defence of *intus habet* must exclude his action. However, as in this case the pursuer's own claim is not yet liquid or ascertained, she cannot have the least pretence for opposing the petitioner's demand.

May it therefore please your Lordships, to review the Lord Ordinary's interlocutor, and to ordain the lands of Canisbie to be exposed to public roup, according to articles to be adjusted at the sight of the Lord Ordinary in the cause; or at least to find, that the pursuer cannot insist, that the petitioner should denude of the debt on the estate of Cromarty, for what may be found due to her in the right of Innes and Clark, while she refuses to concur or consent to the sale of the lands of Canisbie, which she holds in security of such sums as may be found due to her.

According to justice, &c.

JO. MACLAURIN.

FEBRUARY 27. 1770.

UNTO THE RIGHT HONOURABLE,

The LORDS of COUNCIL and SESSION,

T H E

P E T I T I O N

O F

ALEXANDER CUTHBERT, Esq;

HUMBLY SHEWETH,

THAT on advising a reclaiming bill for the petitioner, and answers for Mrs. *Elizabeth Dunbar*, your Lordships, of this date, pronounced the following interlocutor: "Having advised this petition, with the Feb. 15. 1770.
" answers thereto, (which answers likewise relate to another petition for *Alexander Cuthbert*, also advised of this date), they
" find, that, *in hoc statu*, they cannot authorise the sale of the estate
" of *Cannisby*; and therefore, adhere to the interlocutor of the
" Lord Ordinary, and refuse the desire of the petition." And upon
" advising the other petition and answers, your Lordships, of the
" same date, pronounced the following interlocutor: " Find, that
" there is no sufficient evidence brought to prove or instruct,
" that *Innes* and *Clark* had possession of the lands of *West Cannis-*
" *by*, prior to the disposition in favours of Sir *Patrick Dunbar*,
" 1719; and adhere to the Lord Ordinary's interlocutor, as to
" that point; but remit to the Lord Ordinary, to grant warrant
" for searching the accompt-books and papers of the deceased
" *William Campbell*, late sheriff-clerk of *Caithness*, and to trans-
" mit

“ mit to this process, what writings shall be found, relative to
 “ clerk *Campbell's* intromissions with the rents of *Cannishby*, prior
 “ to the said year 1719; and to grant diligence, for recovering
 “ the accompt-books and other writings of the deceased *Alexander*
 “ *Frazer*, relative to his alledged intromissions with the rents of
 “ said lands of *Cannishby*, prior to the said period; and also, to
 “ hear parties procurators, upon what further the petitioner con-
 “ descends upon, and offers to prove, relative to the intromis-
 “ sions of *Innes* and *Clark* with the foresaid rents, and by whom
 “ he is to prove the same; and, as to the third prayer of the pe-
 “ tion, respecting the inspection of the papers called for from
 “ *David Lathian*, remit to the Lord Ordinary, to do therein as
 “ he shall see cause: Find, That the 153 *l. Scots* bill, said to
 “ have been paid to *John Colley*, cannot be taken into the ac-
 “ comptant's report, as there is no evidence in process of its
 “ existence; and remit to the Lord Ordinary, to proceed accord-
 “ ingly, and to do further in the cause, as he shall think just.”
 The petitioner must intreat a review of the interlocutor first re-
 cited, and likewise of the first part of the other, finding, that
 there is no sufficient evidence brought, that *Innes* and *Clark* had
 possession of the lands of *West Cannishby*, prior to the 1719.

The fact, in this case, has been often stated to your Lordships:
 However, in order to judge of the first point, it will be proper
 to bring it again under your eye.

John Cuthbert of *Plaids*, who was a weak man, and in an em-
 barrased situation, pitched upon *Alexander Clark*, merchant in *In-*
verness, and *Robert Innes*, designed of *Mondole*, as trustees, for ex-
 tricating his affairs; and to them, for this purpose, he granted
 three several dispositions of all his funds.

Aug. 15. By the *first*, he constituted them his factors and trustees, for
 1709. uplifting all debts and sums of money, heritable or movable,
 due him by the Earl of *Cromarty*, *Sinclair* of *Mey*, and the ten-
 nants of *Cannishby*, and 6000 merks, in a bond granted by Sir
James Dunbar, to all which he assigned them.

Oct. 21. By the *second*, he conveys to them two apprisings of the lands
 1709. of *Mey* and *Cannishby*, with the lands of *Cannishby*, and the 6000
 merks above mentioned.

This disposition, however, having been reckoned too general,
 Jan. 30. a *third* was execute, by which, after reciting the two former,
 1710. *Plaids* conveyed to his said trustees, their heirs and assignies, the
 said

said two apprisings of the estate of *Mey* and *Cannisby*, a decreet of ranking and sale of those estates, and the sums and lands adjudged to him by that decreet; and this disposition contains procuratory and precept, with an assignation to the mails and duties bygone and in time coming.

Plaids never having been infest, his trustees obtained, of the same date with the last disposition, a bond from him for 50,000 merks; upon which they charged him to enter heir, and obtained an adjudication of all the subjects conveyed by the above dispositions, together with some burgage tenements of his in *Inverness*.

Of even date with each of these dispositions, back-bonds were granted by *Innes* and *Clark*, declaring them to be in trust and security of what sums they had advanced for him, or should advance, with interest; after deduction of which, they obliged themselves to be accountable, and to denude in favour of *Plaids*, his heirs or assignies.

Soon after obtaining these dispositions, the trustees entered upon the possession and management of all the subjects they were able to get access to, as all the papers of *Plaids* were delivered up to them at granting the first disposition.

For three or four years, it would appear, these trustees supported *Plaids*, and paid some of his debts; but they soon forgot their duty, misapplied and squandered the funds, allowing the poor man himself almost to starve.

John Cuthbert of *Castlehill*, the petitioner's father, who was a near relation, and considerable creditor to *Plaids*, resolved to take some measures, to secure the debt due to himself, and retrieve, if possible, the affairs of his friend.

With this view, *Plaids* granted to *Castlehill* a conveyance of the whole subjects he had formerly disposed to *Innes* and *Clark*, and to their several back-bonds, with full power to call them to an account, and to pursue in his own, or cedent's name; "and to hinder and impede any agreements with any of my debtors, that may be made by them unfrugally, or to loss." July 17.
1713.

Of the same date, *Castlehill* granted back-bond to *Plaids*, declaring this conveyance to be in security of debts due to him, amounting then to a capital of 5000 *l. Scots*, and obliged himself to account for his intromissions, after deducing these debts.

In

In 1719, *Clark* became bankrupt, and, soon after, so did *Innes*, the other trustee.

Aug. 8.
1719.

In that year, *Sir Patrick Dunbar* of *Northfield* having come under some obligations for *Clark*, *Clark*, for *Sir Patrick's* security, by a deed, of this date, conveyed to him the various subjects which had been disposed to him and *Innes* by *Plaids*; and particularly, among others, the lands of *Cannishy*, to the rents of which he assigns him, from the preceeding term of *Whitsunday* 1719.

Sir Patrick Dunbar obtained himself decerned executor-creditor to *Innes*, by the commissary of *Moray*, and then obtained decret, *cognitionis causa*, against *Jonathan Innes*, his son and heir apparent.

Sir Patrick died before he proceeded any further; and his daughter, *Mrs. Elizabeth Dunbar*, in virtue of a general disposition from him, confirmed the sums in the said decret, *cognitionis causa*, and obtained an adjudication thereon against the above mentioned *Jonathan Innes*, for the accumulate sum of 8800 *l. Scots* of *Innes* of *Mondole's* half of the whole subjects that *Plaids* had disposed to him and *Clark*.

In 1713, *Castlehill*, the husband of *Mrs. Jean Hay*, from whom the petitioner derives right, in order to follow out the design of extricating *Plaids's* affairs, for which he had entered into the transaction with him, above mentioned, that is, to do justice to himself and *Plaids*, brought a process against *Innes* and *Clark*, the Earl of *Glenarty*, and *Sir Patrick Dunbar*, who, long before this, had obtained possession of all the papers belonging to *Plaids*, and of the lands of *West Cannishy*. The summons against *Innes* and *Clark* in 1713, sets forth, that they had uplifted to the amount of 51,000 merks; and concludes, that they should make compt, reckoning, and payment to him thereof, or of whatever other balance should be found due by them, upon a fair compt and reckoning.——*Castlehill*, at the same time, raised inhibition and arrestment upon *Innes* and *Clark's* back-bonds; and the summons having been allowed to ly over, was again awakened in the 1722, but no procedure seems to have been had on the wakening.

A new process of exhibition, deauling, and payment, was again raised in the year 1732, against the representatives of *Innes* and *Clark*, *Sir Patrick Dunbar*, and the Earl of *Glenarty*. But *Castlehill's* death, which happened in

in 1733, put a stop to that process, before any thing material was done.

Castlehill having executed a general disposition in favours of his wife, Mrs. *Jean Hay*, she adjudged, in implement, from his heir, all the subjects to which he had right, particularly, the lands of *West Cannisby*, and the sums to which *Plaids* was preferred, in the ranking of the creditors of *Mey*.

In 1749, Mrs. *Jean Hay*, for herself and children, entered a claim upon the forfeited estate of *Cromarty*, for 5486 l. 3 s. 8 d. for which, by the decret of ranking in 1695, the heirs of Provost *Cuthbert* had been ranked upon the estate of *Mey*, purchased by the Earl of *Cromarty*.

The crown having objected, that she had not produced the original grounds of her claim, she obtained a diligence against Sir *Patrick Dunbar*, for recovering the writings necessary, which had been put into his hands by *Innes* and *Clark*; and accordingly, Sir *Patrick* appeared, and exhibited, upon oath, as many as were necessary for supporting the claim.

About the same time, Mrs. *Jean Hay* acquired from *Margaret Cuthbert*, the only child and heir of the above-mentioned *John Cuthbert* of *Plaids*, a disposition of all lands, heritages, and other rights which had belonged to her father, and particularly, his claim on the estate of *Mey*, and a ratification of all rights and deeds granted by *Plaids* to *Castlehill*.

After a very tedious and expensive litigation with the crown, Mrs. *Jean Hay* had her claim sustained by the unanimous judgment of your Lordships: By which judgment it was likewise found, "That she or they (Mrs. *Jean Hay* and her children) shall not be entitled to draw the whole, or any part of the sums in their claim, until previous caution be found acted in the books of council and session, by her and her children, to apply the sums which they shall draw in virtue of the said claim, and hereof, in payment of what *Christian Watson* and her children may be found intitled to draw, by decret of the said Lords of council and session, out of the said fund, in virtue of the debts on which their claim is founded, reserving to both parties all their defences and objections, *hinc inde*." July 29. 1762.

After all this, and after Sir *Patrick Dunbar* had suffered her, at a great expence, to obtain a judgment against the crown, without interfering, she did not expect the litigation with which

she has been since distressed by his daughter, now spouse to *James Sinclair of Durin, Esq.* But that Lady, and her husband, thought proper, upon a conveyance from Sir *Patrick* to her, and upon those from *Innes* and *Clark* to Sir *Patrick*, to bring an action before this court, against Mrs. *Jean Hay*, and the officers of state, concluding to have it found and declared, that she had a preferable right to the debt upon the estate of *Cromarty*; and that, therefore, Mrs. *Jean Hay* should be decreed to denude in her favour of that claim, and of the decretet sustaining it.

In support of this action, she alledged, that *Innes* and *Clark* had advanced to the extent of 30,000*l.* *Scots* for *Plaids*, and produced an accompt to shew this, with some vouchers; but no credit was given for any intromissions had with the subjects of *Plaids*.

Nov. 24.
1764. The cause came, in course, before Lord *Gardenston*, who, of this date, ordained the pursuer to give in an accompt of her and her author's intromissions with the effects of *John Cuthbert*.

But the pursuer, instead of complying with the interlocutor, gave in an accompt or condescendence, which was a mere go-by: And, indeed, she insisted, that she was not obliged to enter into a compt and reckoning, and that, *ante omnia*, Mrs. *Jean Hay* should be obliged to denude in her favour. This Mrs. *Hay* denied; and likewise insisted, that the pursuer had no title to maintain the action, unless she showed to what extent Sir *Patrick* had paid, or been distressed, as cautioner for *Clark*.

Dec. 18.
1764. The Lord Ordinary, of this date, pronounced the following interlocutor: " Having considered the above debate, mutual me-
" morials, and haill process, finds, That the defender, in virtue
" of her titles founded upon, and particularly, in virtue of the
" decretet sustaining her claim, is vested in the right and proper-
" ty of the debt upon the forfeited estate of *Cromarty*: Finds,
" That the pursuer is not intitled to insist, that the defender shall
" denude of the said debt in her favours, excepting in so far as
" the said pursuer shall instruct distress or payment of the debt,
" for the relief of which, Sir *Patrick Dunbar* got a conveyance
" from *Clark*: Finds, That the pursuer cannot found upon the
" right of *Innes*, excepting in so far as she shall instruct, that *In-*
" *nes* was a creditor to *Plaids*, by advance made under the trust-
" conveyance to him and *Clark*, and in so far as the said pur-
" suer shall also instruct, that she is a just and lawful creditor to
" *Innes* ;

" *Innes* ; and allows her to give in an accompt of charge and discharge accordingly."

Thereafter, upon a representation for the pursuers, and answers, the Lord Ordinary pronounced the following interlocutor : " Ad- Feb. 11. 1766.
heres to the former interlocutor, in so far as it finds, That the
" defender, in virtue of her title founded upon, and, particular-
" ly, in virtue of the decreets sustaining her claim, is vested in
" the right and property of the debt upon the forfeited estate of
" *Cromarty* ; but varies the subsequent part of the interlocutor,
" and finds, That the conveyance of this debt, granted by *Plaids*,
" was only a right in security for the sums truly advanced, or to
" be advanced by *Innes* and *Clark*, for *Plaids*'s behoof, and was
" a trust, as to the residue or reversion, which right, *Innes* and
" *Clark* could not transfer to Sir *Patrick Dunbar* : Finds, That the
" pursuer is intitled to insist, that the defender shall denude in
" her favour, in so far as the said pursuer shall instruct *Innes* and
" *Clark* were creditors to *Plaids* ; and that she is not obliged to in-
" struct to what extent Sir *Patrick Dunbar* was creditor to *Innes*
" and *Clark*, his authors ; and ordains her to give in an accompt
" of charge and discharge thereof accordingly."

Against this interlocutor, both parties preferred representations, which were both refused : Upon which, both parties preferred reclaiming petitions. Mrs. *Hay*, in her petition, insisted, that Mrs. *Elizabeth Dunbar*'s claim had been cut off by her neglecting to enter her claim in the time prescribed by the vesting act, and several other points, which it is unnecessary to mention. The petition was refused, and the Lord Ordinary's interlocutor adhered to.

Mrs. *Dunbar*, in her petition, insisted, as she had done in her representation to the Ordinary, that though Mrs. *Hay* had entered a claim for the debt, and got it sustained ; yet she, Mrs. *Dunbar*, had the solid, substantial, and preferable interest in the money ; and that, therefore, Mrs. *Hay* should be ordained to denude in her favour of the claim, the rather, that she was willing to reimburse her of the expence she had laid out in getting the claim sustained ; and likewise, to find security to repeat to her, in case, upon a compt and reckoning, it should appear, that she was overpaid, by what she received from the money secured on the estate of *Cromarty*.

But your Lordships, upon advising this petition, with the answers, were pleased to " adhere to the interlocutor reclaimed a- Nov. 26.
gainst, 1766.

“ gainst, with this variation, that the defender, *Mrs. Jean Hay*, shall be obliged, before she draw the money in question, to find sufficient caution for paying back, and repeating the same to the pursuer and her husband, or what part thereof they shall be found intitled to, in the event of this process; and remit to the Lord Ordinary to proceed accordingly.”

The cause having come back to the Lord Ordinary, a compt and reckoning ensued; a remit to an accomptant was granted, and he made a partial report, as to some particulars. This report ascertained the sum advanced for *Plaids* by *Innes* and *Clark*, to be about 8000*l. Scots*; but the accomptant did not, and could not report, as to the extent of the intromissions by *Innes* and *Clark*, by which, the sum advanced by them, fell to be diminished. The extent of these intromissions, was the subject of much litigation before the Ordinary.

July 14.
1768.

His Lordship, by interlocutor, of this date, found, “ That the pursuer is only obliged to accompt for the rents of the lands of *Cannisby* from *Whitsunday* 1719, in respect, the defender offers no proof of an earlier possession by *Innes* and *Clark*, the original trustees, and shows no sufficient cause for resting on bare presumptions of an earlier possession:” And this interlocutor was adhered to, upon petition and answers.

The cause having come back to the Ordinary, the petitioner produced a conveyance from his mother, the said *Mrs. Jean Hay*, of the said decret, sustaining her claim on *Cremarty*; and he obtained, upon a condescendence and answers, a proof, *prout de jure*, for instructing *Innes* and *Clark*’s possession, prior to *Whitsunday* 1719; and a proof was accordingly led: But the Lord Ordinary, upon advising it, found, that he had not brought sufficient evidence to instruct an earlier possession.

The petitioner, upon this, preferred a representation, praying an alteration of the interlocutor, or, at least, that warrant should be granted to a proper person, to inspect the papers of the deceased *William Campbell*, theriff-clerk of *Guthrie*, who had been employed by *Innes* and *Clark*, to uplift the rents of the lands of *Cannisby* for them; of which inspection, the petitioner had been deprived, at leading the proof, by the death of the said *William Campbell*’s representative, who left an infant heir. But this representation, the Lord Ordinary, upon answers, refused: And afterwards, his Lordship adhered to that interlocutor; upon which, the petition-

er preferred a reclaiming bill; upon advising which, with answers, your Lordships pronounced the interlocutor of the 15th current, adhering to the Lord Ordinary's interlocutor, finding no sufficient evidence yet brought of an earlier possession of the lands of *Cannishy*, by *Innes* and *Clark*, than *Whitfunday* 1719.

That upon the Lord Ordinary's finding the new proof brought by the petitioner, was not sufficient to instruct, that *Innes* and *Clark* had possessed the said lands prior to the 1719, the petitioner foresaw, that a further proof might be necessary for him, and that such proof would be attended with some delay and expence to both parties: Therefore, it occurred to the petitioner, that it would be a proper and prudent measure for all concerned, that the lands of *Cannishy* should be sold. These lands yield at least about 20 *l.* *Sterling* of old rent, that has never been raised; and, on account of several particular circumstances, it is believed, they would sell very high, and bring a sum that would do much more than pay the sum claimed by the pursuer, Mrs. *Dunbar*, in the right of *Innes* and *Clark*: If so, it is clear, that the pursuer would fall to have right to the price for her security, and would have no occasion to insist upon her present demand of the claim on the estate of *Cromarty*; and so, expence and trouble would be saved to all concerned.

The petitioner, with this view, inrolled the cause before the Lord Ordinary, and insisted, that the pursuer, who is in the right of *Innes* and *Clark*, the trustees, should be ordained to expose these lands to public roup, upon proper articles, to be adjusted at the sight of the Lord Ordinary.

That the pursuer appeared by her council at this calling, and admitted, that the petitioner's desire was reasonable; that the step was proper and prudent, and the fair way for getting full value for the lands, was by public roup; and upon this the Lord Ordinary ordered minutes to be made up, that his authority might be interponed.

That when the minute came to be made up, the petitioner found the pursuer was disposed to retract; and, on pretence that she did not chuse this cause should be embarrassed with a sale, refused her consent thereto.

That the petitioner having again inrolled the cause, the pursuer did retract her former agreement; but, to give some colour to this extraordinary conduct, pretended, that the sale would

embarrass this process ; and, at the same time, made an offer of denuding, upon payment of what shall be ascertained to be due to her, after receiving the accomptant's report ; or, upon the petitioner's lodging in process a conveyance to the debt on *Cromarty*, to the extent of what shall appear to be due to *Innes and Clark*, she would, *simul et semel*, lodge a disposition, in favour of the petitioner, with a right to the rents of the lands from *Whit Sunday* next. To which it was answered for the petitioner, That it was not competent for the pursuer, to retract her former consent by her council at the bar ; and, though it were competent, it was most unreasonable, as, upon a fair sale, the price of the lands in question, would far exceed the utmost balance pretended to be due : That the pursuer, who was in the right of the trustees, could not, with any justice, refuse her assent to a sale of one of the subjects conveyed to them in security, when called upon by the truster, or the person who is in his right, to do so, which was the case here, the petitioner being in the right of *Plaids* : That as to any embarrassment or expence, the petitioner was willing to undertake the trouble and expence of advertising and exposing the lands to sale, &c. all he wanted of the pursuer, being only to adhibit her consent thereto, and bind herself to denude in favour of a purchaser, the price being taken payable to her, in security of what balance may be found due to her : And, in order to remove every possibility of objection, or cavil, the petitioner was willing immediately to find undoubted caution to pay any balance that might be found due to the pursuer, over and above the price of the said lands ; for which reason, she need give herself no trouble about the debt on the estate of *Cromarty*.

That the Lord Ordinary, upon advising the minutes, pronounced the following interlocutor : “ Finds, That the Ordinary has “ no power, *in hoc statu*, to authorise the sale demanded, leaving “ to the defenders to make application to the whole court for that “ purpose, as they shall be advised.”

That against this judgment, the petitioner preferred a reclaiming bill, praying your Lordships to ordain the lands of *Cannishy* to be exposed to public roup, according to articles to be adjusted at the sight of the Lord Ordinary ; or, at least, to find, that the pursuer cannot insist, that the petitioner should denude of the debt on the estate of *Cromarty*, for what may be found due to her in the right of *Innes and Clark*, when she refused to concur or consent

consent to the sale of the lands of *Cannisby* : But, upon advising petition and answers, your Lordships pronounced the other interlocutor, above recited, of the 15th current, finding, That your Lordships could not authorise the sale of the lands of *West Cannisby, in hoc statu* ; and therefore, adhering to the Lord Ordinary's interlocutor.

These judgments the petitioner submits to review ; and, 1st, As to the interlocutor, finding, that the court cannot authorise the sale of the lands of *Cannisby, in hoc statu*, it will be proper to consider what are the rights of the different parties, what is the nature of the demand which the petitioner makes, and what are his motives for making that demand.

As to the rights of the parties, the pursuer's authors had disposed to them, *in trust and security*, by *Plaids*, the lands of *West Cannisby*, and likewise the apprisings of the estate of *Mey*, afterwards purchased by Lord *Cromarty*, of the first of which, viz. the lands of *Cannisby*, possession was obtained by her authors, and is held by her ; but of the last, neither she, nor her authors, ever attained possession.

The petitioner, on the other hand, has in him both the right of a secondary creditor, and of the original truster or disposer in security : He has the right of a secondary creditor, because he is in the right of *Cuthbert of Castlehill*, to whom *Plaids* granted a second conveyance in 1713, above mentioned, of the subjects he had formerly conveyed to *Innes* and *Clark* ; which disposition to *Castlehill*, like that to *Innes* and *Clark*, was both in trust and in security ; and the petitioner is in the right of *Plaids* the original truster or disposer, in virtue of the conveyance above mentioned, from *Margaret Cuthbert*, the heir of *Plaids*, to Mrs. *Jean Hay* : And, in virtue of these titles, it has been established, by interlocutors long ago become final, that the said Mrs. *Jane Hay*, and, consequently, the petitioner, is vested in the property of the debt upon *Cromarty* ; and that she is intitled to draw the same, upon finding security for paying back and repeating the same to the petitioner, and her husband, or what part thereof they shall be found intitled to, in the event of this process.

The nature of the demand made by the petitioner, is, that the pursuer shall concur and consent to the sale of the lands of *West Cannisby*, which she holds as a pledge or security.

The

The petitioner does not desire, that the pursuer should be at the least trouble or expence about the sale: He is willing to take the whole of that upon himself. Neither does the petitioner insist, that the price of the lands, when sold, shall be paid over to him, or even, that it shall remain, *in medio*, in the hands of the purchaser: He is willing, that the whole of the price shall be paid to the pursuer: He believes it will amount to more, indeed, than what will be found due to the pursuer, on a compt and reckoning; but as the pursuer is in good circumstances, he is willing that she shall touch the whole of this price, as he will be in no difficulty to repeat from her the overplus, in case it shall be more than shall be found due to her, on a compt and reckoning. This the petitioner offered at the bar, and still does offer. And, further, though there is all the reason in the world to believe, that the price of the lands of *Cannibry* will exceed the amount of the debt that may be found due to the pursuer, in the event of the compt and reckoning; yet, the petitioner is further willing to find undoubted caution, to pay to the pursuer, whatever the amount of any deficiency may be, in case there be any.

The petitioner's motives to make this demand, are two, *first*, That the pursuer may have no pretence for interfering with him, in recovering this debt on the estate of *Cromarty*: And, *2dly*, That the lands may be sold to the best advantage, which would be the case, if they are sold just now, on account of certain circumstances attending the *Ordnerys*, contiguous to which, the lands are situated.

So standing the case, the petitioner apprehends, that it is very unjust and improper for the pursuer, to refuse to concur in the sale proposed: No solid sensible reason can be assigned for the refusal: The sale can do the pursuer no sort of prejudice, and would be of great advantage to the petitioner; and which, therefore, the pursuer cannot oppose, except from humour, or a mistaken notion: But whenever the petitioner offers to go to the right, the pursuer goes to the left.

It is agreed, on all hands, that the pursuer's authors held, and that the pursuer holds, the lands of *Cannibry*, as a pledge, or security, for the sums advanced by them to *Plaidis*. It therefore follows, from the nature of the right, that the pursuer cannot, with any grace or title, oppose a sale of the pledge. Such opposition is, indeed, inconsistent with the nature of the contract of
pledge;

pledge; and, therefore, it is justly established by the *Roman* law, that a paction, that the pledge shall not be sold, is void; and, therefore, though such paction had been interposed, at entering into the contract, the creditor might, nevertheless, sell, after using the formality of making three intimations to the debtor. "Sed etsi non convenerit de distrahendo pignore, hoc tamen jure utimur, ut liceat distrahere; si modo non convenit ne liceat, ubi vero convenit ne distraheretur, creditor, si distraxerit, furti obligatur, nisi ei ter fuerit denunciatum, ut solvat et cessaverit: *l. 4. ff. De pign. act.*"—And, indeed, this is obviously just from the nature of the thing. The contract of pledge is entered into for the benefit of both parties concerned: It is for the benefit of the creditor, because he has a real security for the loan of his money; and it is for the behoof of the debtor, because he has thereby an opportunity of getting money, without being laid under the necessity of immediately selling his subject. This is very well explained in another text of the *Roman* law: "Creditor, quoque, qui pignus accepit, re obligatur; quia et ipse de ea re quam accepit restituenda, tenetur actione pignoratitia; sed quia pignus utriusque gratia datur, et debitoris, quo magis pecunia ei credatur, et creditoris, quo magis ei in tuto sit creditum, placuit sufficere, si ad eam custodiendam, exactam diligentiam adhibeat, quam si præstiterit, et aliquo fortuito casu rem amiserit, securum esse, nec impediri creditum petere: § 4. *Inst. quib. mod. re contr. oblig.*"—And, therefore, it would be absurd, and incompatible with the nature of the contract, to give force to the paction, either on the one side or the other, that the pledge should never be sold.—However, whatever the force of a paction may be, is of no consequence in this case, as it is not pretended there was any such paction here; and, therefore, it is perfectly clear, from the nature of the contract, that creditor *re obligatur* to concur and consent to a sale, when insisted for by the debtor.

The *Roman* law takes several precautions, to prevent a precipitate or privy sale on the part of the creditor, and therefore requires, that he should make several previous intimations before he can sell; but there is no particular text in it, so far as the petitioner can discover, touching the case of a wanton or malicious refusal, on the part of the creditor, to concur in the sale: The reason of which, probably, has been, 1st, That it was not imagined ever any such case could occur: And, 2^{dly}, That if

it should, there could be no doubt, but that the creditor would be compellable, *actione pignoratitia*, to sell the pledge, or would be repelled, *ope exceptionis*, if he attempted to attach either the debtor's person, or other subjects, while, at the same time, he withheld his consent from a sale of that pledge, in his hands, which would pay him.

No decisions of this court, either, are to be found upon such question, for this plain reason, that no such question ever occurred, the pursuer being the first creditor in the world that ever opposed the conversion of the pledge into money for his own payment: And, with submission, there seems to be no reason, in law or equity, for listening to a creditor's refusal to concur in selling the pledge. There can be no doubt, that the pledge might be redeemed, *solutione*, or payment, which puts an end to the creditor's right over it; and, if so, it is a necessary consequence, that the creditor is compellable to concur in the sale, at the instance of the debtor; for, as the debtor has a power to redeem, upon payment, the creditor ought not to be allowed to prevent the debtor from using the means to get the money wherewith to make that payment, which he does, if he refuses to concur in a sale of the pledge, as that sale is the only means, very possibly, which the debtor has to get the money: So that, in reality, the creditor may as well refuse to divest himself of the pledge, upon payment, as refuse to concur in a sale of the pledge; for which reason, there can be no doubt, that in case of such refusal by a creditor, the *actio pignoratitia*, or a process to compel him to such sale, would ly. By the *Roman* law, the debtor himself might sell the pledge, as the property remained in him, and only the possession was transferred to the creditor; and, therefore, upon a sale by the debtor, the property was transferred to the purchaser, subject to the right of pledge in the creditor: And, in moveables, the same thing might be done with us. But, in such a case as the present, where a land estate has been disposed away in security, and the title-deeds delivered up to the creditor, under a back-bond, the disponent, or those in his right, cannot properly sell; and, therefore, it is very necessary, that the creditor should be compellable to concur in a sale of the subject, in order that he may receive his payment, and the debtor have the residue, if there be any.

And,

And, if a creditor be compellable to concur in the sale of an estate, or of a moveable subject impignorated to him, in order that he may receive payment, that the debt may be discharged, and the debtor have the reversion, if there be any; *multo magis*, should such creditor be compellable to concur in a sale of the pledge, in a case like the present. For what is the case here? The creditor is not only holding the pledge, and refusing to sell it, but he is, at the very same time, insisting to attach another subject belonging to the debtor. Now, if the *actio impignoratoria*, or a process to sell, would ly against a creditor possessed of a pledge, who was not wanting to attach any other subject belonging to the debtor; surely, much more should an exception be competent against such creditor, when wantonly insisting to attach another subject of the debtor, *cui damus actionem, ei multo magis damus exceptionem*; and, therefore, the petitioner is well intitled to maintain, either that the court should authorise a sale of the subject in question, or find, that the pursuer cannot insist in the present action, while she refuses to concur in a sale.

A process at the petitioner's instance does not seem to be necessary; if it were, that form could easily be complied with; or the process, at *Castlehill's* instance, against *Innes* and *Clark*, in 1732, might be awakened, and a conclusion added to the summons for that purpose: But, as the process at the pursuer's instance, against the petitioners, for denuding of the debt on *Cromarty*, has resolved into a compt and reckoning; and, as that compt and reckoning cannot be expedite, and matters settled between the parties, without a sale of these lands some time or other, it is thought the court has sufficient powers to authorise a sale of the subject in question.

However, supposing the court had not such powers, without a proper action at the petitioner's instance; yet, surely, the court can apply a compulstio equally effectual, by finding, that the pursuer cannot insist, while she refuses to concur in such sale; and every principle of law or equity will justify such interlocutor. Accordingly, it will be observed, that the petitioner, in his last reclaiming bill, prayed the court, *alternative*, either to ordain a sale, or find, that the pursuer could not insist, while she refused to concur in one; and the interlocutor under review, only exhausts the first part of the prayer.

The

The argument on the part of the pursuer, on this point, was as follows : ‘ The respondent’s right to those lands is not a right of property, but a right in security only, of the sums due to them : They are, therefore, in law and justice, entitled to hold the subject disposed in security, till they receive payment of their debt : Then, indeed, and not till then, will it be competent for those having interest, to insist, that they redispone, or denude, or that their right and security are purged and become void ; but it would be extraordinary, to oblige them to part with the lands, before their debt was fully cleared.

‘ Thus, it is a sufficient answer to every thing urged in the petition, to ask, Whether it was ever heard, that a creditor who had got a right to, and security over one or more subjects, was obliged to part with all, or some, or any of these ? that the debtor, or other person in his right, could force them to be sold, either by roup, or otherwise ? or that the creditor could, on any pretence, be compelled to denude or surrender his security, unless and before full payment was both offered and made ? Could *Plaid’s* himself, on appearing, insist, to have any one of the subjects disposed by himself to his creditors, for their security and relief, either redispensed or sold, without making such payment ? But the petitioner will not, surely, pretend to have any better, or broader right than *Plaid’s*.

‘ This was the defender’s own idea : For the Lord Ordinary, more than a year and a half ago, on advising the accomptant’s report, with memorials on the three points suggested by him, pronounced an interlocutor, of this date, finding, *inter alia*, “ That the conveyance from *Innes* and *Clark* to Sir *Patrick Dunbar*, imported only a right in security ; and, therefore, there is no room for determining the third question proposed by the accomptant, *viz.* In what manner the value of the said lands is to be ascertained and accounted for.”

July 14.
1768.

But the answer to all this, from what has been already submitted, will readily occur. The pursuer is, no doubt, intitled to hold the lands in question, in security, till she gets payment : Every creditor, no doubt, who has a subject impignorated to him, is intitled to do so ; but then, he is not intitled to refuse payment, when actually offered him in money ; or, which is the same thing, in reality, to hinder the debtor from using the only means he has, wherewith to get that payment, by refusing to concur

concur in a sale. The petitioner does not want the pursuer to part with the lands, even upon caution to pay her; he only wants her to part with them, upon getting payment of their value. And what else but mere humour should make the pursuer oppose this, is incomprehensible; for, by such sale, she will get payment, either of the whole, or, at least, of a great part of her debt; which is, certainly, a benefit to her, and much more for her interest, than a conveyance from the petitioner to the debt on *Cromarty*, which would run her into a competition with another creditor, who has a claim reserved to him on the debt on *Cromarty*, as above mentioned. The sale, therefore, of the lands in question, would evidently be a benefit to the pursuer; and this benefit being attended with an accidental advantage to the petitioner, because of the particular circumstances that tend to make these lands sell high at present, ought certainly to be no reason to her for opposing the sale.

As to what is said, that it never was heard of, that a creditor who had got a security over one or more subjects, could be obliged to part with, or sell all, or any of them, till he got full payment:—It is answered, in the *first* place, That when a creditor has several subjects impignorated to him, any one of which is sufficient to pay his debt, there is no reason, in law or equity, to hinder the debtor to insist, that he should sell one of them: On the contrary, it is most just and equitable, that he should be compellable to sell one of them; and that the right of election, as to which of them should be sold, is not in the creditor, but in the debtor, for this plain reason, that it is all one to the creditor, which of them be sold; for he has no interest, concern, or connection with them, further than to get payment of his debt: Whereas, it may be very material and interesting to the debtor; that one of them be sold, rather than another. As for example, suppose that a creditor has got disposed to him in security, his debtor's paternal estate, as also an heritable bond or adjudication, which his debtor has over the estate of another; that the debt for which these subjects were impignorated, has been, by payment or intromissions, reduced so far, as that the heritable bond or adjudication would suffice to pay: Can it be maintained, that the creditor, in that case, could refuse to sell the heritable debt or adjudication, and arbitrarily insist to rouse the debtor's own estate? The petitioner apprehends, he could not.

The election of which of the pledges should be sold, most certainly is *pence debitorum*; for it is all one to the creditor, which subject be sold, if he get his money: Whereas, for many reasons, it may not be all one to the debtor, which of the subjects be sold: And therefore, it is clear, he ought to have the election, and has a right to insist, either that the adjudication should be sold, and the estate preserved, or that the estate be sold, and the adjudication preserved; for he is the best judge of what is most for his own interest. This question does not seem to be canvassed in the common law-books, but it is stated and resolved, as above, by a very good lawyer, viz. *Brunneman*, in his *Com. at l. 6. c. De districtione pignorum*. His words are, “An creditoris arbitris permittatur ex pignoribus sibi obligatis, ex quibus velit distractis creditum suum conferre?”—Et id quidem affirmatur, *l. 8. ff. h. t. et l. 19. ff. De pig.* “Æquius tamen est, si ex una vel altera re, eaque viliori, debitum redigere possit, ne reliquas, præsertim majoris pretii, distrahat.”—*Arg. l. 5. § 10. ff. De reb. cor. qui sub tutela*, “Non enim interest creditoris, quomodo fiat distractio, modo creditor suum consequatur creditum, quo potius nihil juris habet, ab ea quæ cum debitoris incommodo sunt conjuncta.—*Mevius, p. 1. dec. 21.*”

But, 2dly, Though it were law, that a creditor could arbitrarily sell any one of several subjects, pledged to him, when he thought proper, it would be of no consequence int his case, as it does not apply: For it will be remembered, that though the apprisings of the estate of *Mej* were conveyed by *Phauls* to *Innes* and *Clark*, and, afterwards, by them to *Sir Patrick Dunbar*; yet it was not *Sir Patrick* who made them effectual upon the estate of *Gromarty*, but the petitioner's author, *Mrs. Jean Hay*, who recovered them upon a diligence from *Sir Patrick*, entered a claim upon them, and got a decret sustaining her claim: and that it has been long ago, and unalterably fixed by the interlocutors above recited, that she, in virtue of that decret, is vested in the property of the debt upon the estate of *Gromarty*, upon finding caution, to repeat to the pursuer, in case, in the event of a compt and reckoning, any thing should be found due her: so that the petitioner has both the property and the possession of this debt, which is not one of several subjects impignorated to the pursuer. It is fully in the petitioner's person, subject to an eventual claim only at the pursuer's instance; and, therefore, there

there is no reason why the pursuer should not concur in a sale of the lands of *Cannisby*, and take her payment out of it, which, it is believed, they would fully afford: If it does not, the petitioner is willing to find caution to make up the deficiency. It is fixed, unalterably, by the interlocutors above recited, that the pursuer cannot oblige the petitioner to denude of the debt on *Cromarty*; that, it is fixed, the petitioner is intitled to draw, on finding caution as above: All, therefore, the pursuer can do, is to insist against the petitioner, to make payment of what she alleges is due to her, in consequence of the caution above mentioned. Now, from what has been above argued, it is hoped it will appear, that it is a good plea, in bar or exception against this action, that the pursuer is possessed of an estate, which, if sold, would pay her; and that it is most emulous and unjust in the pursuer, to refuse to concur in a sale of that estate, when it can do her no prejudice, and when it would be most advantageous to the petitioner, as that estate would sell high just now, when, very probably, that will not be the case, if the present opportunity be let slip. The petitioner is, in the right of *Plaids*, the original truster and disponent in security. If *Innes and Clark*, his disponees, had brought an action to attach another subject belonging to him, or a personal action against him for payment, it certainly would be a good defence to him, to have said, Sell the lands of *Cannisby*; they will pay you, either in whole, and then you can have no action at all against me, or in part, and then you can only have action for the balance: And if this would have been a good defence to *Plaids*, it must likewise be so to the petitioner, who is in the right of *Plaids*.

As to the pretence, that this question was determined by the Lord Ordinary's interlocutor above mentioned, it scarcely deserves an answer. The accomptant was going upon a supposition, that the property of the lands was in the pursuer: But the Lord Ordinary very justly found, that the right of property, or reversion, was in the petitioner; and, therefore, the pursuer was not to be charged with the value of the lands, as sold to her authors, but with their, or her own intromissions, with the rents.

As to a difficulty, that was suggested against authorising a sale of the lands in question, that third parties might have rights or securities upon them, that will be intirely removed, when it is informed,

informed, that there are none such existing: No third party whatever has any impediment or incumbrance on the lands, that can in the least impede or embarrass a sale; and, accordingly, no such thing was pretended by the pursuer: And therefore, it is hoped, upon the whole, that the court will have no difficulty, either to ordain the lands to be sold, or, at least, to find, that the pursuer cannot insist in this process, while she refuses to pay herself, by consenting to sell the lands in question.

The other point which the petitioner submits to review, is, the first part of the other interlocutor reclaimed against, finding, that the petitioner has not brought sufficient evidence, that *Innes* and *Clark* intromitted with the lands of *Cannisby*, before *Whitsunday* 1719.

As the petitioner has been allowed a further proof by the inspection of clerk *Campbell's* writings, and of several writings in the hands of Mr. *Lothian*, the pursuer's agent; and as these writings may, very probably, either by themselves, or joined with the presumptions and proof already brought, instruct the intromissions of *Innes* and *Clark*, from 1694, or 1709, the petitioner submits, if it would not be better to keep this point open, till the result of the further investigation.

At any rate, the petitioner is hopeful your Lordships will, upon reconsideration, be of opinion, that there is sufficient evidence of their having intromitted from 1717; and that from the following evidence:

1mo, There is the following bill drawn by *Alexander Fraser*, collector of the bishop's rents of *Cuthness*, and doer for Provost *Clark*, one of the trustees, upon *John Innes* of *Borlum*. It is as follows:

" Sir,

Thursd, 12th May 1719.

" At fourteen days sight, pay to me, *Alexander Fraser*, collector of the bishop's rents of *Cuthness*, or order, at my house in *Stralser*, the sum of 261 l. 14 s. 10 d. Scots money, value in your hands of me, as the rents of *Wester Cannisby*, belonging to Provost *Clark*, for which you are an intromission by my order, and granted bill to Provost *Clark*, at *Martmas* last, for the foresaid sum for which you'll make thankful payment, and oblige, Sir, your humble servant,

ALEXANDER FRASER.

To *John Innes* }
of *Borlum*. }

Accepts, JOHN INNES.

Innes

Innes of Borlum was son-in-law to the said *Alexander Frazer*; and it appears from the deposition of *Jean Reid*, who was his servant for part of the year 1717, and the whole of the year 1718, "That *Borlum* came to *Gills* (a farm contiguous to *West Cannisby*) Pr. p. 3, "at *Whitsunday* 1717, and got the management of the lands of C. "*West Cannisby* from his father-in-law, Mr. *Frazer*, collector of the "bishop's rents, that he might have the services of the tenants to "work upon the farm of *Gills*."

As the bill above-recited, expressly bears to be for the rents of *West Cannisby*, belonging to *Provost Clark*; as it is dated 12th May 1719, and bears, that Mr. *Frazer* had granted his bill to *Provost Clark* for the same sum, at *Martinmas* preceeding, it instructs, in the clearest manner, that *Innes of Borlum*, had, by authority derived from *Provost Clark*, intromitted with these rents before *Whitsunday* 1719; besides, that the sum in the bill is much more than the pursuer admits to be one year's rent of these lands.

It is very true, that this evidence of *Innes of Borlum's* possession having been by authority derived from *Provost Clark*, might be thought rather scrimp, if taken entirely by itself, without attending to the other circumstances of the case: But when your Lordships consider, that it is admitted, that Sir *Patrick Dunbar*, *Clark's* disponee, attained possession precisely in the terms of *Clark's* disposition to him at *Whitsunday* 1719, and that no other person but *Clark*, and his partner, *Innes*, in consequence of their trust-adjudication against *Plaids*, were entitled to the possession, it is hoped, that little doubt can remain, of this possession of *Borlum's* having been in the right of *Clark*.

But, 2do, There is still further evidence, that *Innes of Borlum* uplifted the rents in 1717 and 1718. There is a protested bill, drawn by him upon *William Dunnet*, farmer in *West Cannisby*, dated 7th July 1718, "For 7 l. 10 s. Scots money, with four "bolls, two sirlots bear, sufficient gernel stuff; and that as the "money and victual rent, and the peat-money, due out of your "occupation in *West Cannisby*." And there is another protested bill, drawn by *Innes* upon *Donald Williamson*, farmer in *West Cannisby*, dated 7th July 1718, "For 17 l. Scots money, with five "bolls bear, being the money and victual rents due by you out "of your occupation in *West Cannisby*, with the peats for the crop "1717." And, in support of this, *Jean Reid* depones, "That P. 3. B. "she

“ she served Mr. Innes of Borlum at Gills, for a part of the year
 “ 1717, and the whole of the year 1718 : That she uplifted the
 “ rent of the lands of *West Cannisby*, from the tenants thereof,
 “ for *Borlum's* behoof, one of these years, but does not perfectly
 “ remember which of them.”

Thus, it is proved, that during the years 1717 and 1718, the rents of *West Cannisby* were uplifted by *Innes of Borlum*, and *Alexander Frazer*, by authority from *Provost Clark*, the original trustee of *Plaids*.

May it therefore please your Lordships to review your former interlocutors, and to ordain the lands of West Cannisby to be exposed to public roup, according to articles to be adjusted at the sight of the Lord Ordinary ; or, at least, to find, That the pursuer cannot insist in this process, while she refuses to concur or consent to the sale of the lands of Cannisby. 2do, To supersede determining the question, from what period the pursuer is to be accountable for the rents of the lands of Cannisby, till after the papers of clerk Campbell have been inspected, and Mr. Lothian has exhibited the papers in his hands, called for by the petitioner ; and to ordain this inspection and exhibition to be made, and the further proof allowed to be reported before answer : At any rate, to find, That the petitioner has already brought sufficient evidence of Innes and Clark's intromissions with the rents of Cannisby, for the crop and year 1717, and downwards.

According to justice, &c.

JO. MACLAURIN.

A N S W E R S

F O R

Mrs. Elizabeth Dunbar, lawful daughter and universal disponee of the deceased Sir Patrick Dunbar of Northfield, and James Sinclair of Duran, Esq; her husband, for his interest,

T O T H E

P E T I T I O N of Alexander Cuthbert, Esq;

GEORGE first Earl of Cromarty, having purchased part of the estate, which belonged to the deceased Sir James Sinclair of Mey, was decerned by the decret dividing the price, to pay to those having right to two apprizings affecting that estate, led at the instance of Alexander Cuthbert, provost, and Alexander Dunbar, merchant in Inverness, the sum of 5154 l. 15 s. 10 d. with that of 331 l. 9 s. 10 d. both Scots, and interest from Whitfunday 1694, and in time coming, during the not-payment.

William Innes writer to the signet, who purchased another part of the estate for behoof of Sinclair of Ulbster, was, in like manner, decerned to pay to the same persons, the sum of 1071 l. 12 s. 4 d. Scots, with interest from the foresaid term of Whitfunday 1694.

These apprizings were originally led in 1664, at the instance of the said Alexander Cuthbert and Alexander Dunbar; but Dunbar having, in 1676, made over his apprising to Cuthbert,

A

both

both apprisings, after Alexander Cuthbert's death, came into the person of John Cuthbert of Plaids, his grand nephew and heir.

Plaids's affairs having been greatly mismanaged by his tutors, of whom Cuthbert of Castlehill was one, he was very early involved in very great difficulties, upon which Robert Innes of Mondole, and Alexander Clark baillie of Inverness, interposed for his relief, and by large advances, proved by vouchers produced, they are confessed to have become considerable creditors to him : and as they were intitled, in justice, to be reimbursed, and as it was universally agreed, that his affairs would be under proper management in the hands of Innes and Clark, so he made over the foresaid two debts, with the lands of West Cannisby, which had been also adjudged by the foresaid decreet, to those having right to the two apprisings, to and in favours of his benefactors Innes and Clark, by two several dispositions, the one dated the 21st of October 1709, and the other the 30th of January 1710.

These conveyances were, *ex facie*, absolute and irredeemable ; but, by back-bonds, of even dates with the dispositions, Innes and Clark became bound to render an account to Plaids, his heirs and assignees, of all sums which they should recover by virtue of the said dispositions ; and it was thereby provided, that out of the first and readiest of the monies, they should be allowed to retain, in their own hands, as much as would satisfy and pay them of all debts and sums of money due by Plaids or his father, or granduncle provost Cuthbert, and which they had either satisfied and cleared, or should thereafter satisfy and clear, with all sums which they either had advanced, or should advance, to Plaids himself.

Innes and Clark, trusting to the security thereby granted, and expecting they would be able to make the monies effectual, proceeded and continued in clearing Plaids's debts, and they are proved, by vouchers produced, to have advanced and paid for him sums now amounting to upwards of 2000 l. sterling.

They were, however, disappointed. The Earl of Cromarty, on various pretences, with-held the money in his hands, and all which they were able to make effectual, was the foresaid sum of 1071 l. Scots due by William Innes.

Castlehill, in the 1713, obtained from Plaids, in favours of his son, John Cuthbert of Castlehill, father of the petitioner, an assignation

signation to the back-bonds above mentioned, granted to him by Innes and Clark.

Alexander Clark, one of the disponees from Plaids, having been nominated executor to the deceased Mr. Robert Fraser Advocate, Sir Patrick Dunbar, the respondent's father, became cautioner for him in the confirmation; and he was thereafter decerned by a decret-arbitral, pronounced by the late Lord Elchies, to pay very considerable sums for Clark, on account of that cautionry; Clark therefore disposed and made over to Sir Patrick Dunbar, his heirs and assignees, the two apprizings aforesaid, and all following thereon, the decret of division, and sums thereby due, with the foresaid lands of West-Cannibsy, and mails and duties thereof, from Whitsunday 1719.

In this manner, Sir Patrick acquired full right to all the interest Clark had in the foresaid debt; and as Clark had been obliged to pay for Innes, the other trustee, very large sums, of which he was entitled to relief, these Clark did also assign, of the same date, to Sir Patrick, on which Sir Patrick obtained himself decerned executor-creditor to Innes before the Commissary of Murray; and having charged Jonathan Innes to enter heir to his father, Robert, he obtained a decret *cognitionis causa*, and thereafter an adjudication was obtained, at the instance of the respondents, as in the right of Sir Patrick Dunbar.

Sir Patrick Dunbar did, of this date, intimate to the Earl of Cromarty, the foresaid disposition and assignation, and he proceeded to take other steps for recovering the money; and, particularly, he entered into a submission in the 1733, but which was allowed to expire without any decret-arbitral; and at length the Earl was attainted, on account of his accession to the rebellion 1745.

Sir Patrick was then an old man, and lived in the remote county of Caithness. His doer, the deceased Mr. Ludovick Brodie, is also known to have been greatly advanced in years; and the six months having accordingly elapsed, before Sir Patrick or his doer were apprised of the survey, so no claim was entered upon the estate of the forfeited person by Sir Patrick,

However, a claim was entered by the now deceased Lady Castlehill, as having right, from her husband, to the back-bond granted to Plaids by Innes and Clark. The grounds necessary for supporting her claim, were recovered by her, on a diligence, out of the hands of Sir Patrick Dunbar. Sir Patrick, with his doer, when
cited

1756.

cited upon this diligence, did assert his right before the late Lord Woodhall, who, by his interlocutor, expressly reserved to Sir Patrick, notwithstanding his producing the writs called for, all right and title which he had to the subject then claimed by Lady Castlehill.

Lady Castlehill, acquiescing in this interlocutor, proceeded to get her claim sustained; and Sir Patrick was only prevented by death from commencing an action, which he was advised it was proper for him to bring, for having it found and declared, by decree of this court, that he had, upon the titles aforesaid, the prior and preferable right to the money, with the best and only title to uplift, receive, and discharge the same.

That action, which he was prevented from instituting, the respondents brought in the 1764; which action came in course before the Lord Gardenston ordinary.

It is unnecessary, for the present purpose, minutely to resume the different steps of procedure in this action. A most obstinate litigation ensued upon the part of the defender, and every possible device was fallen upon to protract and delay the cause.

February 11,
1766.

The Lord Ordinary, upon advising a representation for the pursuers, and answers for the defender, of this date, pronounced the following interlocutor: ‘ Adheres to the former interlocutor, in so far as it finds, that the defender, in virtue of her title founded upon, and, particularly, in virtue of the decreets sustaining her claim, is vested in the right and property of the debt upon the forfeited estate of Cromarty; but varies the subsequent part of the interlocutor, and finds, that the conveyance of this debt granted by Plaids, was only a right in security for the sums truly advanced, or to be advanced by Innes and Clark, for Plaids’s behoof, and was a trust, as to the residue or reversion; which right, Innes and Clark could not transfer to Sir Patrick Dunbar: Finds, *that the pursuer is entitled to insist, that the defender shall stand in her favour, in so far as the said pursuer shall instruct Innes and Clark were creditors to Plaids; and that she is not obliged to instruct, to what extent Sir Patrick Dunbar was creditor to Innes and Clark, his authors; and ordains her to give in an account of charge and discharge thereof accordingly.*’

The defender presented a reclaiming petition against the foregoing interlocutor, in which it was maintained, that the pursuer’s right

right to any part of the money affecting the estate of Cromarty, was cut off by the vesting-act. The respondents, on the other hand, being advised, that the right being prior and preferable to that of the defender, intitled them to an immediate decree, preferring them to the money, and foreseeing the consequences, which they have since felt, of entering into any unnecessary litigation with the defender, preferred a petition upon their part, in which they offered to find the best caution to account for any overplus that might be found due out of that fund, after clearing the debt due to them; and, in respect of that offer, prayed your Lordships to decern and declare against the defender, ' That they had the prior and preferable titles to the foresaid money or debt, found due out of the forfeited estate of Cromarty, as well as the only and undoubted right to uplift and discharge the same; and accordingly to decern the defender to denude herself of, and assign the decree, sustaining the claim in her favour, upon the said forfeited estate.'

Your Lordships, on advising these petitions, with answers, refused both, and adhered to the Lord Ordinary's interlocutors, with this variation, ' That the defender, Mrs. Jean Hay, shall ^{Nov. 26,} be obliged, before she draw the money in question, to find sufficient caution for paying back and repeating the same to the pursuer and her husband, or what part thereof they shall be found intitled to, in the event of this process; and remit to the Lord Ordinary to proceed accordingly.'

The cause having returned to the Lord Ordinary, a count and reckoning ensued, and a remit was made to an accountant to make up a state of the accounts, and to report his opinion upon the objections and answers thereto. June 23,
1767.

The defender, however, would not acquiesce in this step, however proper and even harmless to the defender, but preferred several representations, on most frivolous grounds, which were all refused; and the report having been made by the accountant, was June 15,
1768. approved of by the Lord Ordinary.

From this report it appears, that the respondent's authors, Innes and Clark, advanced and paid, to and on account of Plaids, sums, which, at this day, amount to upwards of 2000 l. sterling; and the advances made by them, were so clearly proved by vouchers produced, that even the defender herself could not contest a single article of them; so that the dispute turned entirely

upon the articles, with which Innes and Clark, and the respondents in their right, fell to be charged.

The defender insisted, that the respondents fell to be charged with various particulars; all of which have been finally settled against the defender, except one article, still in dependence, respecting the rents of the lands of West Cannisby, with which, it was insisted, the respondents authors fell to be charged from the 1694; and the Lord Ordinary, by his interlocutor, of this date, found, 'That the pursuer is only obliged to account for the rents of the lands of Cannisby from Whit Sunday 1719, in respect the defender offers no proof of an earlier possession by Innes and Clark, the original trustees, and shows no sufficient cause for resting on bare presumptions of an earlier possession;' and this interlocutor was adhered to, upon petition and answers.

The petitioner thereafter was allowed a proof for instructing Innes and Clark's possession, prior to Whit Sunday 1719; but the Lord Ordinary, upon advising, found that he had not brought sufficient evidence to instruct an earlier possession.

The petitioner thereupon preferred a representation, praying an alteration of the interlocutor, or, at least, that warrant should be granted for inspecting the papers of the deceased William Campbell, sheriff-clerk of Caithness, for instructing further intromissions against Innes and Clark, but this representation was, upon answers, refused.

The petitioner having insisted before the Lord Ordinary, that the respondents, as in the right of Innes and Clark, should be ordained to expose the lands of West Cannisby to public roup, upon proper articles, to be adjusted at the sight of the Lord Ordinary, and that the price thereof might be applied towards payment of the respondents claims; and the Lord Ordinary, upon advising a minute of debate, pronounced the following interlocutor: 'Finds, that the Ordinary has no power, *in hoc statu*, to authorise the sale demanded, leaving to the defenders to make application to the whole court for that purpose, as they shall be advised.'

The defenders reclaimed against the foresaid interlocutor, and also against the other interlocutor of the Lord Ordinary, respecting Innes and Clark's intromissions with the lands of West Cannisby.

Upon

July 14,
1768.

Upon advising the first of these petitions, with the answers, your Lordships, of this date, pronounced the following interlocutor: ' Having advised this petition, with the answers thereto, ^{Feb. 15, 1770.} which answers likewise relate to another petition for Alexander Cuthbert, also advised of this date, they find, that, *in hoc statu*, they cannot authorise the sale of the estate of Cannisby, and therefore adhere to the interlocutor of the Lord Ordinary, and refuse the desire of the petition.'

And, upon advising the other petition and answers, your Lordships, of the same date, pronounced the following interlocutor: ' Find that there is no sufficient evidence brought to prove or instruct, that Innes and Clark had possession of the lands of West Cannisby, prior to the disposition in favours of Sir Patrick Dunbar 1719, and adhere to the Lord Ordinary's interlocutor as to that point, but remit to the Lord Ordinary to grant warrant for searching the account-books and papers of the deceased William Campbell, late sheriff-clerk of Caithness, and to transmit to this process what writings shall be found relative to clerk Campbell's intromissions with the rents of Cannisby, prior to the said year 1719, and to grant diligence for recovering the account-books, and other writings of the deceased Alexander Fraser, relative to his alledged intromissions with the rents of the said lands of Cannisby, prior to the said period, and also to hear parties procurators upon what further the petitioner condescends upon, and offers to prove, relative to the intromissions of Innes and Clark, with the foresaid rents, and by whom he is to prove the same; and, as to the third prayer of the petition, respecting the inspection of the papers, called for from David Lothian, remit to the Lord Ordinary to do therein as he shall see cause: find, that the 1531. Scots bill, said to have been paid to John Colly, cannot be taken into the accountant's report, as there is no evidence in process of its existence, and remit to the Lord Ordinary to proceed accordingly.'

The defender hath reclaimed against the foresaid two interlocutors, in which he prays your Lordships ' to ordain the Lands of West Cannisby to be exposed to publick roup, according to articles, to be adjusted at the sight of the Lord Ordinary, or, at least, to find that the pursuer cannot insist in this process, whilst she refuses to concur or consent to the sale of the lands of Cannisby. 2do, To supersede determining the question from what period

‘ period the pursuer is to be accountable for the rents of the lands of Cannisby, till after the papers of clerk Campbell have been inspected, and Mr. Lothian has exhibited the papers in his hands, called for by the petitioner, and to ordain this inspection and exhibition to be made, and the further proof allowed to be reported before answer; at any rate, to find *that the petitioner has already brought sufficient evidence of Innes and Clark's intromissions with the rents of Cannisby, for the crop and year 1717, and downwards.*’

March 2,
1770.

This petition your Lordships ordained to be seen and answered, &c. ‘ But, without prejudice to the Lord Ordinary to proceed in the exhibition and proof, at calling the cause, any time ‘ this session.’

The petition is long and elaborate, and the argument is branched out to a great length; but, as the respondents will be pardoned to think, that the doctrine maintained in the petition is inconsistent with the established principles of the law of Scotland, and indeed of every other country, known to the respondents, so they apprehend it will be very unnecessary to trouble your Lordships with much argument in answering the petition.

From the above deduction of the respondents titles, your Lordships will perceive the nature of the right that is vested in the respondents. Plaids, by the deeds above recited, conveyed to Innes and Clark, the respondents authors, the lands of West Cannisby, and the foresaid debt upon Cromarty. These conveyances are, *ex facie*, absolute and irredeemable, but are qualified by back-bonds of even dates with the disposition, by which Innes and Clark are taken bound to render an account to Plaids, his heirs and assignees, but that they should be allowed to retain, in their own hands, as much as would satisfy and pay them of all debts and sums of money, which Innes and Clark had paid, or should pay, or had advanced, or should advance, on Plaids's account.

The right, therefore, of Innes and Clark, resolved into a right in security over the whole subjects conveyed, for every shilling, in which they are creditors to Plaids. The right that remained in Plaids, was no more than a right of reversion, after these debts were satisfied and paid, and, consequently, Innes and Clark were preferable, over all and each of these subjects, for every shilling of their debts, both to Plaids himself, and to every person in his right.

right. He neither did give, nor could give more to the petitioner's father, Castlehill, than the right of reversion, after paying the debts due to Innes and Clark; or, in other words, the right which he conveyed to the petitioner's father, behoved necessarily to be burdened with the whole debts that were due to Innes and Clark; and, upon these grounds it was, that it was adjudged by the Lord Ordinary, by his interlocutor of the 11th February 1766, 'That the pursuer was intitled to insist, that the defender shall denude in her favour, in so far as the pursuer shall instruct Innes and Clark were creditors to Plaids;' and which interlocutor was adhered to by your Lordships.

As therefore the respondents, as in the right of Innes and Clark, have a clear right in security, for the whole sums due to them by Plaids, over the whole subjects, the debt upon Cromarty, as well as the lands of West Cannisby, and that preferable to any right in the petitioner, so the respondents apprehend, that upon the clear and established principles of the law of Scotland, the respondents are entitled to hold their right over the whole of the subjects, until the last shilling of the debt shall be paid. Where fundry different subjects are impledged for the same debt, all and each of the subjects stand affected with the debt to its full amount, *unaquæque gleba servit*; so that the creditor is entitled to hold his security over the whole of the subjects, until the last shilling of his debt is paid. This is clearly implied in the very definition of a pledge that is given in the Roman law; and the *actio directa* at the instance of the debtor for redelivery of the thing impledged, was only competent upon payment of the whole debt, but not upon payment of a part. This is clearly laid down, l. 3. § 3. ff. *de pignoratitia actione*, "Omnis pecunia exsoluta esse debet, aut eo nomine satisfactum esse, ut noscatur pignoratitia actio." The right that is vested in the creditor, is his own proper estate, over which the debtor has no earthly power. It was given to him *ea lege, ut soluto debito restitatur*: and therefore, as long as a shilling of the debt is unpaid, he is entitled to hold his pledge. He cannot be bound to restore it, either to the debtor, or to any other person whatever.

The petitioner says, that the price of the lands will in this case be sufficient to pay his whole debt; and as the petitioner cannot sell the subjects without the concurrence of the respondents; that

G

therefore

therefore they ought to be obliged to concur, that so the price may be applied in extinction of the respondents claims.

But it is a very chimerical imagination in the petitioners to suppose that any price that can be expected for the lands in question, will go near to pay the respondents claims. The free rent of the lands is about 16 l. Sterling, and the respondents are credibly informed that the highest price that can be expected, will not exceed 400 l. Sterling, whereas it is instructed by the clearest vouchers, that the respondents claims, after all deductions, do still amount to above 1500 l. Sterling.

But the respondents apprehend, that whatever shall be the value of the subjects, it will not alter the present question. The respondents are entitled to hold their security over all and each of the subjects, until the last farthing of the debt be actually paid; and before actual payment, the respondents cannot be obliged to concur in a sale of any part of the subjects, which will clearly have the effect so far to lose their right in security.

If the subjects will yield a price equal to the whole debt, the petitioner stands in no need of the consent or concurrence of the respondents, but he has sufficient powers, and will be in perfect safety to sell the lands himself; because, as the respondents have no other right than a mere right in security, so, upon payment of their debt, their right would be at an end; and, upon applying the price in payment of their claim, they would be obliged to denude of their right, either in favour of the petitioner, or any person purchasing from him. The civil law, and the law of Scotland do not differ in this particular, as is said in the petition. In both cases the debtor may sell the pledge, and the pledgee's right will become unexceptionable, providing, either by the price or otherways, the whole debt shall be paid to the creditor.

If, on the other hand, (which is certainly the case) the price of the lands of Carnilly, will not be sufficient for payment of their whole debt, the respondents do say, that no creditor is obliged to accept of a partial payment; he is entitled to insist that every shilling of his debt shall be paid together; and, until the last shilling is paid, he is entitled to hold his right in security as to every subject over which it extends. He is not obliged to accept of the price of the subjects impledged, or of any part of them, in part payment of his debt, and to renounce his security *quoad*
these

these subjects, but he is clearly entitled to hold it until the last shilling is paid.

The petitioner has been at great pains to show from the civil law, that a pledge might be sold, and that even a paction that the pledge should not be sold, was void. But it is plain that these authorities do not in the least apply to the present case; they all respect the powers of the creditor, but not those of the debtor. The civil law has so anxiously provided for the payment of the creditor, that he may sell the pledge, after making three intimations to the debtor, notwithstanding it had been stipulated, at entering into the contract, that the creditor should not be at liberty to sell the pledge. The power of selling was a right or privilege established in favours of the creditor, which he might either use or not; and it would have been much more apposite to the present case, if the petitioner could have shown that the debtor could compel the creditor to exercise his right of selling, and that whether he inclined to sell or not.

In like manner, it is very often practised in this country, that where a right in security is given to a creditor, he likewise gets a power to sell, that so he may apply the price for his payment. At the same time, that is a right which the creditor may either exercise, or not, and no instance can be given where in such a case the debtor compelled the creditor to exercise that right whether he would or not. In all such cases, it is understood to be a right established in favours of the creditor, but which right he is not obliged to exercise, unless he shall incline. He is entitled to rely upon his right in security, and which he is entitled to hold, until the debtor shall lose it by payment of every farthing of the debt.

The petitioner admits, that there is no particular text in the Roman law, tending to establish, that the debtor could compel the creditor to sell the pledge; and the reason he assigns for it is, that it was not imagined ever such a case could occur; and the reason he assigns, why there are no decisions of this court upon the point is, that the respondent is the first that ever opposed the conversion of the pledge into money, for his own payment. But, with all submission, a much better reason does occur to the respondents, why no such thing was provided for by the civil law, viz. because it would have been inconsistent with the very nature of the contract. The pledge is given to the creditor *ea lege, ut soluto debito*

debito restitatur ; and it would be plainly inconsistent with such contract, to oblige the creditor to quit with his security before he actually got his payment. The same is truly the reason, why no decisions of this court are to be found upon the point. It is so clearly founded in the established principles of the law of Scotland, that a creditor who gets a right in security, is intitled to hold *that* right, until the last penny is paid, that, hitherto, it never entered into the head of any person to controvert it, or make it a question.

The reasons which the petitioner is pleaded to assign for making so extraordinary and so unprecedented a demand, are these : 1mo, ' That the pursuers may have no pretence for interfering with him ' in recovering this debt on the estate of Cromarty : And, 2do, ' That the lands may be sold to the best advantage, which (it is ' said) would be the case, if they are sold just now, on account of ' certain circumstances attending the Orkneys, contiguous to ' which the lands are situated.' And the petitioner says, that, under these circumstances, it is *emulous* in the respondents to withhold their consent, when the giving of it can be of no sort of prejudice to them, and of great advantage to the petitioner.

With respect to the *first* of these, the respondents will be pardoned to think, that it must appear to your Lordships to be very unsatisfactory. It has been already observed, that the respondents have a right upon that money, clearly *preferable* to that of the petitioner ; and accordingly it now stands adjudged, that the defender must *denude* in favours of the respondents, in so far as they shall instruct Innes and Clark were creditors to Plaids. There cannot, therefore, be a more proper application of the Cromarty money, than to satisfy the respondents claims ; and they have in law and in justice, a right to insist that it shall be so applied.

With respect to the *second* reason, although the respondents are, in law, intitled to hold their security over the lands of Cannisby, until the last farthing of their debt be paid, yet they are so far from meaning to do any thing to hurt the petitioner, or to stand in the way of what he thinks a proper opportunity of selling the lands of Cannisby to the best advantage, that they formerly offered, and do here again offer, to renounce their security over the lands of Cannisby in favours of the petitioner, upon his conveying to them the debt upon Cromarty ; and they do farther offer to find a most unquestionable security, at the sight of the court,

court, to refund to the petitioner any balance that shall remain of that debt, after payment of the respondents claim.

The petitioner says, That a debtor may have an attachment to *one* of his subjects, more than another ; and that where different subjects are impledged, it is highly reasonable that he should have his choice, which of these subjects should be disposed of for the creditors payment. But it is impossible that that consideration can have any weight in this case. The petitioner can never pretend a *pretium affectionis* for the debt upon Cromarty, more than for any sum of money of the same extent. The payment of the respondents claim, is a most proper application of that money. The petitioner cannot pretend to hold one fixpence of Plaids's funds, without paying the last farthing of the respondents claim. Under these circumstances, the petitioner himself ought to choose to apply that money for the respondents payment ; and if nothing but what is right and proper be truly intended by him, he ought to comply with the offer that is made. In justice and in equity he cannot refuse it ; and the respondents may, with justice, retort upon him his own observation, that it would be *emulous* in him to refuse, what in reality is doing him no hurt, and which, at the same time, is doing no more than justice to the respondents.

Nor is this a matter of indifference to the respondents. The debt upon Cromarty is now ready to be paid over by the publick ; and it is certainly much more eligible for the respondents to draw their payment out of *that* fund, than to be thrown upon the lands of Cannisby, the price of which will not pay a third part of the debt, and, at the same time, very uncertain when that price may be got ; for however willing parties may be to sell, it is not in their power to command a purchaser ; and however forward the petitioner may now appear for a sale, yet, after he has fingered the Cromarty money, the respondents have too good reason to be apprehensive that that keenness may abate.

The respondents have already been kept out of their money for several years, by a litigation maintained with a very uncommon and extraordinary degree of obstinacy upon the part of the petitioner and his predecessor ; and if the petitioner shall once be possessed of the Cromarty money, the respondents are afraid that pretences may be fallen upon for still keeping the matter in dependence ; whereas, if that money shall exceed the respondents

claim, and if it is either paid over to them, or is to remain *in medio*, till the present disputes shall be ended, the respondents are persuaded that parties would be immediately out of court.

After what has been said, it is scarce necessary to observe, that, even supposing the respondents could be compelled to concur in a sale, that the petitioner is not in a proper action for that purpose. The present action is none other, than an action, at the respondents instance, for declaring their prior and preferable right to uplift and receive payment of the debt on Cromarty: and it is a strange suggestion that is made in the petition, that, supposing your Lordships had not powers to authorise a sale, without a proper action at the petitioner's instance, that yet your Lordships should enforce the respondent's compliance, by finding, that she cannot insist, while she refuses to concur in such sale; which is saying, in other words, that, in order to compel the respondents to do what, in this process, they cannot be compelled to do, your Lordships should withhold from the respondents what they are entitled to demand in this action.

Upon the whole, the respondents have a security, both over the debt upon Cromarty, and the lands of West-Cannibby, preferable to any right in the petitioner; and they are entitled in law, to hold their security over the *whole* subjects, until the last farthing of their debt shall be paid. The petitioner is not entitled to pocket one farthing of the Cromarty money, without paying the whole of the respondents claim; and as that money is about to be paid, it would, with submission, be highly unjust, that the petitioner should be allowed to keep that money in his pocket, and that the preferable creditor must wait the uncertain event of a sale of the lands of Cannibby, before he can draw his payment. The respondents, in order to accommodate the petitioner, are willing to renounce their security upon these lands, upon being assigned to the debt upon Cromarty; as, upon paying the respondents debt out of that money, the petitioner will have no occasion for the respondents concurrence in the sale of these lands. If the foregoing is refused, the respondents are persuaded that your Lordships will be of opinion, that it is not *equum* in the respondents not to agree to the petitioner's unprecedented demand, and which, with submission, has clearly no foundation in law.

The other point submitted to your Lordships review is, How far there is sufficient evidence, that Innes and Clark intromitted with the rents of West-Cannisby for the years 1717 and 1718?

With respect to this point, the respondents must, in the general, observe, that, by the conveyances granted by Plaids, in favours of Innes and Clark, they are expressly declared, not to be liable for omissions, but for actual intromissions only; and it stands finally adjudged, that neither they, nor the respondents, can, in law or in justice, be subjected to a single farthing, unless in so far as it is clearly established that they did intromit.

The petitioner, in this case, rests the proof of the supposed intromissions, for the years 1717 and 1718, upon the evidence of the three bills mentioned in the petition, two of them bearing date 7th July 1718, drawn by Innes of Borlum, and accepted, the one by William Dunnet, and the other, by Donald Williamson, both in West-Cannisby; and the third dated 12th May 1719, drawn by Alexander Frazer, collector of the bishop's rents of Caithness, and accepted by the said John Innes of Borlum.

But, besides that, the bills themselves are not produced, but only extracts of protests of these bills, the two bills of 7th July 1718, do not so much as mention the names of Robert Innes of Mondole, or Provost Clark; and, instead of proving that they intromitted, either with the rents of West-Cannisby, or with the particular sums therein contained, the utmost which it can be pretended they prove, is no more, than that one John Innes of Borlum drew two bills, which were accepted, for the particulars therein mentioned, by one William Dunnet, and by another called Donald Williamson, as the money and victual rents for their respective occupations in West-Cannisby; but who, or what John Innes of Borlum was, does not appear, either from the bills themselves, or from other evidence; and there is not the least proof he was any ways connected with Innes and Clark.

The same observations apply to the other bill, or rather copy of a protest, dated 12th May 1719, drawn by Alexander Frazer upon, and accepted by, John Innes of Borlum, for the sum of 261 l. 14 s. 10 d. Scots, as the rents of West Cannisby, belonging to provost

Clark. This bill, instead of showing that Innes and Clark uplifted or intromitted with the rents, proves the reverse. It is true, the lands are therein said to belong to provost Clark;

Clark ; but this was extremely natural, because they had been disposed long before, viz. in 1710, to him and Innes. The bill, however, if it proves any thing, ascertains, imo, That not Innes and Clark, but one Alexander Frazer, collector of the bishop's rents in Caithness, was the person who had right to, and did actually uplift the rents ; it is drawn for value therein acknowledged to have been received from Frazer, and Borlum is said to have been in intromission with them, but the intromission is declared to have been in consequence of an order from Frazer alone ; and it is of no importance that a bill is therein said to have been granted to Provost Clark, at the Martinmas preceeding, for the foresaid sum. This is not even evidence, without production of the writing itself, that such bill was actually granted to the Provost ; but if it had, it is not said, in the other protested one produced, to have been granted for the rents of Cannisby ; but indefinitely for a sum in money, which might be, and probably was, a private debt due to Provost Clark, totally unconnected with the present affairs ; and if it related to them, it rather proves that Provost Clark did not intromit with the money therein mentioned ; for that it was not allowed to be paid to him by Borlum, but taken from him by the collector of the bishop's rents, who obliged Borlum to accept a bill for it to himself.

In respect whereof, &c.

RO. MACQUEEN.

AUGUST 2. 1770.

[Lord GARDENSTOUN Reporter.]

INFORMATION

F O R

ALEXANDER CUTHBERT, Esq; Defender ;

A G A I N S T

Mrs. Elizabeth Dunbar, and James Sinclair of Durin,
Esq; her Husband, for his Interest, Pursuers.

JOHAN CUTHBERT of *Plaids*, as apparent heir and representative of his granduncle, *Alexander Cuthbert*, provost of *Inverness*, did, by a deed, of date 15th August 1709, "Make and Aug. 15.
"constitute *Robert Innes* of *Mondole*, and Mr. *Alexander Clark*, one of 1709.
"the baillies of *Inverness*, his very lawful factors, actors, and special
"errand-bearers, for meddling, intromitting with, and receiving, all
"debts and sums of money whatsoever, and others, any manner
"of way due and addebted to the said *John Cuthbert*, whether heritable,
"ble, real, or moveable, by an noble and potent Earl, *George* Earl of
"Cromarty, Sir *James Sinclair* of *Mey*, and the tenants and possessors
"of *Easter Canisby*, sometime belonging to the said Sir *James*
"Sinclair, and for meddling and intromitting with the sum of 6000
"merks money of *North Britain*, of principal, and hail annualrent
"and expences due thereupon, contained in a bond of provision,
"made and granted by Sir *James Dunbar*, younger of *Hemprigs*, &c.
"with full power, liberty and faculty to the said factors, to call
"for, meddle, and intromit with all sums of money, and others
"whatsoever, any manner of way due, resting, and indubted to
"to the said *John Cuthbert*, by all and every one of the above de-
"signed

"*signed debtors and tenants of Easter Canisby, for whatsoever cause or occasion, with power to them to call and pursue therefore, as accords; and, upon payment, to grant receipts and discharge thereupon, &c.*

Aug. 15.
1729. By back-bond, of the same date, the said *Robert Innes* and *Alexander Clark*, "Band and obliged them, their heirs, executors and successors, *to make just compt, reckoning and payment, of what sums of money they should happen to recover from all or any of the above designed debtors and tenants, by virtue of, and upon the foresaid right; deducing always, and allowing, in the first place, all and whatsoever debts they should happen to procure right and title to, due by the said John Cuthbert, to whatsoever person or persons, with all necessary and contingent charges and expences, that they should happen to deburse and give out in the said affair, with a competent salary for their own pains and travail in negotiating and managing his said affair; thereby declaring, that what debts should be acquired from any of the creditors of the said John Cuthbert, which they should pay and purge by his own effects, any composition that they might happen to procure, upon such payment, the same should truly and effectually redound, and be communicate be them to the said John Cuthbert himself, and his foretants.*"

Oct. 21.
1729. By another deed, of date 21st *October 1729*, the said *John Cuthbert* "sold, disposed, and assigned to the said *Robert Innes* and *Alexander Clark*, their heirs, &c. the appraisings deduced against the estate of *Samuel of Aley*, at the instance of his said granduncle and father, or whereunto they, or either of them, had right by process, with all right title, and interest, which the said *John Cuthbert*, or his predecessors, had thereto, and without prejudice of the foresaid generality, any share, part, or portion of the said estate of *Aley*, allocate and set apart for the said *John Cuthbert*, by the Lords of council and session, in the decret of sale of the same, past in the year One thousand six hundred and ninety years, and the security given therefore by *George Earl of Orkney*, or whoever else was the purchaser, principal, annualrent, and penalty therein contained, with the lands of *Easter Canisby*, in the shire of *Cuthbert*, also destinate by the said Lords, for a part of the payment of the sums contained in the foresaid appraisings, *with the moir's and dunes thereof, bygone and to come; and likewise the sum of*

“ 6000 merks *Scots* money, with penalty and annualrents, contained in a bond of provision granted by Sir *James Dunbar*, &c.”

By back-bond of the same date with this disposition, it is declared, “ That albeit the said disposition and assignation did contain and bear the same to be granted for an onerous cause, and receipt of money by the said *John Cuthbert*, from the said *Robert Innes* and Mr. *Alexander Clark*; yet the truth was, the same was only a trust put upon them by the said *John Cuthbert*, in order to satisfy and pay his debts, and manage his affairs upon the terms and conditions under-written: Therefore, the saids *Robert Innes* and *Alexander Clark*, band and obliged them, their heirs, executors, and successors, to make just compt, reckoning, and payment to the said *John Cuthbert*, his heirs or assignies, of any sum or sums of money, which they, or any of them, should receive from any person, by virtue of the disposition and right before-mentioned; providing, that out of the first and readiest of any sums of money arising, or to be received, they are allowed to retain in their own hands as much thereof as will completely satisfy and pay them all and every debts and sums of money due by the said *John Cuthbert*, already satisfied and cleared by them, or which they should have satisfied and cleared thereafter, conform to the rights of the saids debts to be granted by his creditors to them.” And likewise, for all sums advanced, or to be advanced to *John Cuthbert* himself, or to be expended in recovering, and making effectual the subjects disposed; and for their personal charge, and a competent salary for their own pains. And further declaring, “ That the foresaid back-bond, and declaration of trust, should noways prejudice, or limit the power and faculty given them by the foresaid disposition and assignation, of composing and agreeing the sums and subject assigned and disposed; and that they should only be comptable, according to their intromissions; and that they should accept, receive, or take, be virtue of the said right: But they thereby band and obliged them, and their foresaids, to bring the subject of the foresaid apprisings against the said estate of *Mey*, with what ensued thereupon, to a period and conclusion, by a friendly agreement with the *Earl of Cromarty*, betwixt the date thereof and the day of 1710; or else, if the saids *Robert Innes* and Mr. *Alexander Clark*

Oct. 21.
1709.

" Clark could not agree therein, to interpose his power, against all parties concerned, and prosecute and follow upon the same, until the final end thereof, upon the said John Cathbert his charges and expences, &c."

Jan. 30. This disposition, 21st October 1700, having been considered as
1710. too general, a second was executed, 30th January 1710; by which, after reciting the two former dispositions, and mentioning, that Robert Innes and Alexander Clark were desirous to have the afore-said subjects more specially transmitted to them, John Cathbert conveyed to them particularly the above mentioned appraisings, the decret of ranking and sale, the sums and lands adjudged to him by that decret; and the disposition contains procuratory of resignation, and precept of sale, together with an assignation to the mails and duties for bygones, and in time coming.

Jan. 30. John Cathbert had never been intert in any of these subjects; and
1710. therefore, Innes and Clark obtained from him, of the same date with this last disposition, a bond for 50,000 merks; upon which, having charged him to enter heir in special to his granduncle, they, of this date, obtained adjudication of the whole subjects and lands conveyed by the fore-said dispositions.

Jan. 30. Of the very same date with the last mentioned disposition
1710. and bond, Innes and Clark granted a back-bond, declaring, " That albeit the said dispositions, assignation, and bond, do contain and bear the samen to be granted for an onerous cause, on receipt of money by the said John Cathbert from the said Robert Innes and Alexander Clark; yet the truth was, the same were granted to them, partly as a security to themselves, and partly in trust, in order to manage the said John Cathbert's affairs. Therefore, they bind and oblige them, their heirs, executors and successors, to make full exact, reckoning, and payment to the said John Cathbert, his heirs or assignies, of any sum or sums of money, they, or any of them, should receive from any person, by virtue of the dispositions and bond before mentioned, providing always, that out of the first and readiest of any sums of money, or mails and duties that they shall receive, they are expressly allowed liberty and faculty to retain in their own hands as much thereof, as will completely satisfy and pay them all and every debt and sums of money due by the said John Cathbert, or his said father, or granduncle already satisfied and cleared by them, or which they shall satisfy and clear there-
after,

“ after, conform to the rights and securities of the saids debts, “ and conveyances thereof, &c.” And likewise, for all sums advanced, or to be advanced to *John Cuthbert* himself, expences in recovering the subjects disposed, *and for a competent salary for their own pains.* And further declaring, “ That the said back-bond and declaration of trust, shall noways prejudice or limit the power and faculty given them, by the foresaid disposition and assignation, of disposing upon, composing, transacting, and agreeing the sums and subjects assigned and disposed; and that they shall only be comptable according to their intromissions, and what they shall accept, receive, or take by virtue of the saids rights; “ but that they shall not be obliged for omissions, &c.”

From these different dispositions, qualified by the different back-bonds of the same dates, your Lordships will observe, that *Innes* and *Clark* were mere factors, for the purpose of recovering and managing the debts and subjects belonging to *Plaids*. The first is a simple factory, by which *Plaids* does not even convey to them in trust his different subjects. Afterwards, the better to enable them to attain possession, it was judged expedient to execute the two trust-dispositions, conveying to them the different subjects therein mentioned. The whole tenor, however, of these deeds, shows, that they were executed solely with the view, that the trustees should act as factors, proceed to recover the different funds conveyed, and should, out of the sums intromitted with, support *Plaids* himself, and pay his debts. These conveyances, therefore, were by no means rights of security to *Innes* and *Clark*, for debts due to them, and; in consequence of which, they were at liberty to intromit with the subjects conveyed, or not, as they should think proper; but were, on the contrary, mere factories to these trustees, for the purpose of managing the affairs of *Plaids*. Accordingly, they expressly bind themselves to account for their intromissions, and for any eases or compositions they should obtain at transacting with his creditors. The second back-bond contains an express obligation upon the trustees, to bring the subject of the appraisings against the estate of *Mey*, with what followed thereon, *to a period and conclusion, by a friendly agreement with the Earl of Cromarty, betwixt and the day of* 1710; *or else, if they would not agree therein, to intent a legal process against all parties concerned, and prosecute and follow forth the same until the final end thereof.* And all these different deeds do

B

specially

Specialty provide, that the trustees shall have a *competent salary* for their own pains and trouble in the management, to be retained by them out of the sums with which they were to intronit; which sufficiently shows the nature of their right, and plainly imports their being bound to *exact diligence* in the management of the affairs intrusted to their care.

Soon after obtaining these dispositions, the trustees entered into the possession and management of several of the subjects conveyed to them. Their mismanagement, however, soon produced complaints, both from the friends and creditors of *Plains*; till, at length, the decedent's father, *John Castlehill* of *Castlehill*, a very near relation, and considerable creditor of *Plains*, resolved to take some measures for securing the debts due to himself, and, if possible, to rescue the affairs of his friend from the hands of these trustees.

1717. He, accordingly, of this date, obtained from *Plains*, a conveyance to the subjects which had been before conveyed to *Innes* and *Clark*, and to the several back-bonds granted by them, "with full power to ask, crave, and obtain just compr, reckon-
"ing and payment of the said *Robert Innes*, and Mr. *Alexander Clark*, their intromission, by virtue of the said dispositions, in
"the terms of the said back bonds, and, if need bees, to pursue
"therefore in his own name, and to hinder and impede any agree-
"ments with any of my debtors that may be made by them unjustly, or to law, &c."

On the same date with this conveyance, *Castlehill* granted a back-bond to *Plains*, declaring the conveyance to be in security of the debts therein particularly mentioned, due to him by *Plains*, and obliging himself to account for his intromissions, after deduction of those debts.

At the time of granting this trust right to *Castlehill*, *Innes* and *Clark* had intronitted with his funds to a much greater extent than all the sums which they advanced. In November 1718, they had recovered payment of a debt then amounting to about *£2000*, due by *William Innes*, son *James* of *Ulster*. *Castlehill* had entered into possession of the lands of *Campy*, and, as it is hoped will afterwards appear, applied the hygienic rents due from *Campy*; and therefore, it was plain, that any sums advanced by them, either to *Plains* himself, or to his creditors, were out of their intromissions with his different funds.

Castlehill,

Castlehill, therefore, immediately after obtaining the disposition above-mentioned, did, in 1713, bring a process against *Innes* and *Clark*, to account for their intromissions, and to oblige them to denude, in terms of their back-bonds. Upon the dependence, *Castlehill* immediately used both inhibition and arrestment; but although the process was frequently renewed and insisted in, it does not seem to have been brought to any effectual conclusion. In 1732, it appears to have been renewed against the trustees, and also against Sir *Patrick Dunbar*, and the Earl of *Cromarty*, but without any success. In 1733, a submission was entered into, with regard to it, between Sir *Patrick Dunbar* and *George Cuthbert*, the son and heir of *John Cuthbert* of *Castlehill*; but in this, little farther seems to have been done, than the giving in some objections to an accout of the sums pretended to have been advanced for *Plaids*, by *Innes* and *Clark*; and no accout of their intromissions seems to have been exhibited. And in this situation matters continued, till the defender's mother and author had recovered decret, for payment of the debt due to *Plaids*, out of the forfeited estate of *Cromarty*. From the 1713, when *Castlehill* raised the first process of compt and reckoning against the trustees, they, conscious that their intromissions exceeded their advances, and well satisfied, if allowed to retain possession of the subjects already in their hands, never afterwards thought proper to insist for payment of the debt due by the Earl of *Cromarty*, or for recovering any of the other subjects belonging to *Plaids*, of which they had not before attained possession.

When the defender's author entered her claim upon the forfeited estate of *Cromarty*, she was allowed to proceed in getting it sustained, without any claim having been entered by the pursuers, or their authors. But at length, when, by a very troublesome and expensive litigation, the defender's author had prevailed in getting the claim sustained; this pursuer, deriving right from the original trustees, brought the present process against him, concluding, to have it found and declared, that she had the preferable right to the aforesaid debt upon the estate of *Cromarty*; and that therefore, the defender should be obliged to denude in her favour, of that claim, and the decret of the court of session sustaining it.

When the cause came first to be called before the Lord *Gardenston*, Ordinary, in the 1764, the defender insisted, that the pursuer,

fuor, as deriving right from the original factors or trustees, should, in the first place, render an account of their *intromissions* with the effects of *John Cathcart*.

The pursuer, on the other hand, occasioned much litigation, by maintaining, that, before entering into any compt and reckoning, the defender should, in the first place, denude in her favour, of the decreet sustaining the claim upon the estate of *Cornwall*. After long litigation upon this point, it was at length finally ascertained, by repeated judgments of the court, that the defender was not obliged to denude any farther, than the pursuer should instruct *Innes* and *Clark*, the original trustees, to have been creditors of *Plaids*.

After this point was determined, when the cause came back to the Lord Ordinary, his Lordship again pronounced repeated interlocutors, ordaining the pursuers to give in an account of charge and discharge of their author's intromissions; but this was as often evaded, and no such account has ever yet been exhibited. Under the pretence of obeying the Lord Ordinary's interlocutors, there was a paper given in, intituled, *An account and confidence*, imparting, in substance, that the pursuers were singular successors, and knew nothing of the trustees intromissions, except that they observed the lands of *Cumbly* had been conveyed by Provost *Clark* to Sir *Patrick Dunbar*, in the 1719. There had been in process, from the beginning, an account of the advances said to have been made for *Plaids* by *Innes* and *Clark*, but without acknowledging any article of deduction or intromission whatever. The defender objected to the justice of several articles of this account, and further insisted, that the pursuers were chargeable with sundry intromissions: And the Lord Ordinary remitted to an accountant to hear parties, and to report upon the whole cause. The accountant made his report, and stated several points for the Lord Ordinary's opinion; particularly, with respect to the time for which the pursuer should be held accountable for the possession of the lands of *Cumbly*.

By the direct of ranking of the creditors of *Southern of Mer*, in 1694, "There were adjudged to the representatives of Provost *Cathcart*, the three penny three farthing and an half cello of the lands of *Cumbly*, holding of the King. &c." And by the same direct, the provost's representatives were declared to have right to the rents, mals and duties from the term

term of *Whitsunday* 1694, and in time coming. *John Cuthbert* of *Plaids*, the grandnephew, and who came to be the heir of provost *Cuthbert*, conveyed the said decret, with all right following thereon, to *Innes* and *Clerk*, his trustees. Afterwards, in 1719, provost *Clark* conveyed his share thereof to Sir *Patrick Dunbar*, who thereafter contrived to patch up a title to the share of *Innes*, the other trustee. By the conveyances to *Innes* and *Clark*, *Plaids* assigned them to the lands of *Canisby*, with the mails and duties thereof, bygone and to come; but by the conveyance from *Clark* to Sir *Patrick Dunbar*, in 1719, the disponent is only assigned to the mails and duties from the term of *Whitsunday* in that year.

The question then occurred, From what period the pursuer should be charged with the rent of these lands; whether from 1694, the commencement of the right of *Plaids* himself, or from 1709, the date of the trust-conveyance to *Innes* and *Clark*, or from 1719, the date of the possession of her father?

The pursuer obstinately denied, that either her father, Sir *Patrick Dunbar*, or any of the original trustees, in whose right she stands, attained possession sooner than 1719; and therefore, contended, that she could not be accountable for the rents from an earlier period. On the other hand, the defender has endeavoured to prove, that the pursuer, and her authors, have uplifted the rents from the date of the decret of ranking in 1694, and must, therefore, be chargeable with them from that period.

The memorialist at first contended, that as the pursuer's authors, the original trustees, had assigned to them the decret of ranking in 1694, with all right following thereon; so they must be presumed, in consequence thereof, to have uplifted the rents of *Canisby* from *Whitsunday* 1694, unless they should show, that other persons had actually intromitted with, and uplifted these rents after that period. Upon advising memorials upon this point, the Lord Ordinary pronounced the following interlocutor: July 14.

" Finds, that the pursuers are only obliged to account for the 1763.

" rents of the lands of *Canisby* from *Whitsunday* 1719, in respect

" the defender offers no proof of an earlier possession by *Innes*

" and *Clark*, the original trustees, and shows no sufficient cause

" for resting upon bare presumptions of an earlier possession."

Against this interlocutor, the defender reclaimed, but your Lord- Jan. 25.
ships adhered. 1769.

Thereafter, the defender prayed to be allowed a proof of *Innes* and *Clark* having possessed the lands of *Canisby*, and intromitted with the rents prior to *Whitsunday* 1719. Upon a lvising a condescendence, with answers, the Lord Ordinary allowed the proof; which having been accordingly taken and reported, his Lordship, upon advising it, pronounced the following interlocutor: " Having considered the condescendence and answers, together with the proof adduced, finds, that the defender has not brought any sufficient evidence, to prove or instruct, that *Innes* and *Clark* had possession of the lands of *West Canisby*, prior to their disposition in favour of Sir *Patrick Dunbar*, in 1719; and authorises the accomptant to make up the state of the accompts accordingly."

July 7
1719.

Against this interlocutor, the memorialist reclaimed; and upon advising his petition, with answers, your Lordships pronounced the following interlocutor: " Find, that there is no sufficient evidence brought, to prove or instruct, that *Innes* and *Clark* had possession of the lands of *West Canisby*, prior to the disposition in favours of Sir *Patrick Dunbar*, 1719, and adhere to the Lord Ordinary's interlocutor, as to that point; but remit to the Lord Ordinary, to grant warrant for searching the accompt-books and papers of the deceased *William Campbell*, late sheriff-clerk of *Caithness*, and to transmit to this process, what writings shall be found relative to clerk *Campbell's* intromissions with the rents of *Canisby*, prior to the said year 1719; and to grant diligence for recovering the accompt-books, and other writings of the deceased *Alexander Fraser*, relative to his alledged intromissions with the rents of said lands of *Canisby*, prior to the said period; and also, to hear parties procurators, upon what further the petitioner condescends upon, and offers to prove, relative to the intromissions of *Innes* and *Clark*, with the foresaid rents, and by whom he is to prove the same; and, as to the third prayer of the petition, respecting the inspection of the papers called for from *David Lotbourn*, remit to the Lord Ordinary, to do therein as he shall see cause."

Feb. 15
1720.

Against this interlocutor the memorialist reclaimed; and prayed the court, " to supersede determining the question, from what period the pursuer is to be accountable for the rents of the lands of *Canisby*, till after the papers of clerk *Campbell* have been inspected, and Mr. *Lotbourn* has exhibited the papers in
" his

“ his hands, called for by the petitioner ; and to ordain this inspection and exhibition to be made, and the further proof allowed, to be reported before answer ; at any rate, to find, that the petitioner has already brought sufficient evidence, of *Innes* and *Clark*’s intromissions with the rents of *Canisby*, for the crop and year 1717, and downwards.” Upon advising this petition, 2d March 1770, your Lordships appointed it to be seen and answered ; but without prejudice to the Lord Ordinary, to proceed in the exhibition and proof, at calling the cause, any time this session.

In consequence of these interlocutors, a further proof was allowed to the defender, and a warrant was granted for searching the account-books and papers of the above-mentioned *William Campbell*. A proof has been accordingly taken, and reported, and a number of material papers have been recovered from the repositories of Clerk *Campbell*, and produced in process. Upon advising this proof, with memorials, the Lord Ordinary has been pleased to take the cause to report, and to ordain both parties to print and give in memorials : In obedience to which appointment, the following is humbly offered upon the part of the defender.

As your Lordships have delayed giving any final judgment upon the proof formerly adduced, till the new proof should be brought under your consideration ; so both proofs fall now to be considered together : And the defender humbly hopes, that, upon considering the whole, there will remain no doubt, that the pursuer must be held accountable for the rents of *Canisby*, from the year 1694.

As the pursuer admits her own possession, and that of her father, Sir *Patrick Dunbar*, from 1719 to the present day, but denies any anterior possession, either by her or her authors ; so, the object of the defender’s proof is to show, 1mo, That Provost *Clark*, one of the original trustees of *Plaids*, did immediately, in consequence of his trust-conveyance in 1709, enter into possession of the lands of *Canisby*, and continued therein till he conveyed them to Sir *Patrick Dunbar* in 1719 ; and, 2do, That Provost *Clark*, when he entered into possession, uplifted the bygone arrears of rent due by the tenants from 1690 to 1694.

As to the *first*, that Provost *Clark* possessed the lands, and uplifted the rents of *Canisby* from 1709 to 1719, it seems, in the humble apprehension of the memorialist, to be now established beyond
all

all doubt, by a series of letters, and other papers lately recovered from the repositories of the above-mentioned Clerk *Campbell*, who appears to have acted as factor for Mr. *Clark*, in uplifting the rents.

The letters are all wrote with Provost *Clark's* own hand, are addressed to Clerk *Campbell*, his factor, and are dated, three of them in 1711, four of them in 1712, three in 1713, and two in 1714. Copies of all these letters, and of the whole proof, are printed, and annexed to this memorial; and all of them do clearly instruct Provost *Clark's* possession during that period.

- Page 1. Thus, 15th September 1711, he writes: "I received yours, giving
No. 2. " account you can get 4 *l.* for the boll of the rents you have
Page 1. " received, *Candlemas* payable." 8th April 1712, he writes: "I
No. 4. " received from *Alexander Oman*, fourcore pounds *Scots* money,
" which shall be allowed you at counting. You'll tell the tenants
" of *Causby* to labour the three-farthling land as formerly. I
" shall send you a formal factory to count with the tenants, and
" to receive what money they have been offering you." 28th July
Page 2. 1713, he writes: "I received 4 *l. Sterling*, which I shall allow
No. 10. " you at counting. Pray, take the most reasonable course you
" can with the farms of *Causby*. I thought the tenants used al-
" ways to malt it; and if they have done so this year, before the
" 24th June last, you will have no difficulty in disposing of it." 19th October 1714, he writes: "I received from the post 55 *l.*
" 5 *s. Scots* money, in part-payment of what is due by the te-
" nants of *Causby*: Pray send me an accompt of the particular
" payments made by them to you."

It is unnecessary to trouble your Lordships with quoting more of these letters, as they may be easily perused in the proof. They are all in the same strain, and all clearly evince the same thing, that Provost *Clark* was actually in possession, uplifted the rents by his factor Mr. *Campbell*, and was particularly attentive to the management of the estate.

Besides these letters, a number of other papers have been recovered from the repositories of Clerk *Campbell*, which, in like manner, do all clearly instruct his uplifting the rents of *Causby* for Provost *Clark*. There is in the proof, No. 13. an engined account of *William Campbell's* intromissions with Provost *Clark's* lands in *Causby*, 1717.—No. 14. Note of payments made by *William Campbell* to Provost *Clark*, since the year 1711, for his letters.—

No.

No. 15. Clearance betwixt *William Campbell* and the tenants of *Canisby*, 25th *October* 1716.—No. 17. A note of farms received from Provost *Clark*'s tenants in the parish of *Canisby*, crop 1714.—No. 25. Notes relating to the rents of *Canisby*, for the years 1711, 1712, &c.—No. 27. Notes, or jottings of the rentals of *Canisby*, and clearances with the tenants, for the years 1711, 1712, 1713, 1714, 1715, and 1716.—And, besides all these, there are a number of other notes and papers, all tending to shew the same thing, and clearly instructing the possession of Provost *Clark*.

Proof,
page 6.

It thus appears certainly established, that Clerk *Campbell*, in virtue of authority from Provost *Clark*, uplifted the rents of *Canisby* from about the year 1709, to the beginning of 1717. From 1717 to the year 1719, when Sir *Patrick Dunbar* entered into possession, it cannot be doubted, that Mr. *Clark* continued to possess; and, therefore, even if there was no direct evidence of his intromission during that interval, it would be justly concluded from his previous possession being proved. There is, however, satisfying evidence of his intromissions from 1717 to 1719; *Imo*, From a summons at the instance of Provost *Clark*, against the tenants of *Canisby*, dated 23d *July* 1717; and, *2do*, From some bills formerly produced in process, and particularly mentioned in the petition, which will be under the consideration of your Lordships at the same time with this memorial. It is unnecessary to add any thing to what is said in the petition, with regard to the evidence arising from these bills. From the whole, it clearly appears, that Provost *Clark*, by his factor, possessed the lands of *Canisby* from 1709; and that the possession has been continued down to this day, by those deriving right from him.

No. 16.
page 8.

It remains, therefore, in the *second* place, to examine what evidence has been brought to prove Provost *Clark*'s having uplifted the bygone arrears of rent, due from the date of the decret of ranking 1694, to the commencement of his own possession upon the factory and trust-conveyances, 1709 and 1710.

From the original letters of Provost *Clark* to his factor and manager *William Campbell*, early in the year 1711, it appears, that the Provost had a very minute acquaintance with the condition of his tenants in *Canisby*; seems to have surveyed the estate, examined the tenants; and, in every respect, writes like a man who had been for some time established in the possession. Besides showing great attention to the management of the lands, he ap-

pears very careful to recover all bygone rents owing by the tenants. Thus, 3d April 1711, he writes, "Affectionate cousin, I had writ to you before now, but that I wait some returns from *Edinburgh*, which I expect by the first post, and shall then write fully to you. *You'll get me notice how long the Laird of Mey drew the teinds: If I mind right, the tenants declared it is only two years since he came over drawing them,*" &c. And to this it may be added, that there is in process a messenger's receipt, for executing a summons, in the name of *Cuthbert of Plaids*, against the old Laird of *Mey*, which, it is more than probable, was for repetition of the teinds, concerning which Mr. *Clark* so anxiously enquires in this letter. Again, 7th May 1711, he writes, "I'm very much obliged to you, for the concern you take in every thing I recommend to you, and shall very gratefully repay your civility. *I agree, that Patrick Swanay's son shall get subat Thomas Groat possessed, and endeavour, if possible, to cause him take Williamton's possession, for I'll not continue him any longer with it.* I'll send you instructions against the 1st of June, for prosecuting the bygone rents: and as to the present ferme, I by these assign the same to you, at the country price."

These letters, and others to the same purpose, sufficiently shew, that at that time, provost *Clark* had been some years in possession, had visited the estate, had made himself well acquainted with the state of the tenantry, and was particularly attentive to the bygone rents. It does not appear, from any letters or writings in process, that clerk *Campbell* was in the management prior to this period. That before him, however, some other person made clearances with the tenants, appears plainly, from a letter to clerk *Campbell* from *George Harcot*, one of the tenants, dated, *Candry, October 31. 1715*; in which, among other things, he writes, "The tenants is thinking long for receipts: They got none for victual since *your entry.*"

As, therefore, it is clear, that provost *Clark* had intromission, prior to that by *William Campbell*, and was granting a faculty to Mr. *Campbell*, for prosecuting bygone rents, the question is, From what period shall he be held to be accountable for these rents?

And here, your Lordships will attend to the particular circumstances in which the defender stands. None of the original trustees are

are now alive; and though frequently called upon when in life, they always declined giving any account whatever of their intromissions; so that there is neither a confession or denial on their part, with regard to the intromissions alledged. None of those who were tenants in these lands during the period in question, are now alive. An old man in that neighbourhood, who has been examined as a witness in this cause, deposes, "That none of the tenants who possessed *West Canisby* before Sir *Patrick Dunbar* entered into the possession thereof, or their children, are now living, so far as the deponent knows." The only direct evidence, therefore, which could be obtained of the intromission of *Clark* with the rents now in question, would be from his papers and account-books, all which came into the possession of Sir *Patrick Dunbar*, the father of the present pursuer. Whether the injuries of time have destroyed any evidence that might have ascertained this matter, or from whatever cause they have disappeared, certain it is, that altho' the memorialist has examined the pursuer, Mr. *Sinclair* of *Durin*, as a haver, and has been at all due pains to recover every document most likely to ascertain this matter; yet, from Mr. *Sinclair's* oath, it would appear, that there is not a scrap of paper left by Sir *Patrick Dunbar*, which can tend to show, who possessed the lands of *West Canisby*, preceeding the year 1719. In this, surely, the defender is peculiarly unfortunate, that although all Provost *Clark's* papers came into the possession of Sir *Patrick Dunbar*, and although the fact is, that Sir *Patrick* himself, a man remarkably accurate and distinct in business, intromitted with the virtual-rent of *Canisby*, in right of Provost *Clark*, for one of the years between the 1709 and 1719; yet time should have cruelly swept away every the least bit of paper, which might show, who possessed these lands before the year 1719.

Although thus deprived of the testimony of witnesses, and of such written evidence as he had good reason to expect, yet the memorialist humbly hopes, that, from the nature of the trust, as well as from the real evidence arising from a chain of circumstances, confirmed and supported by the proof and documents lately recovered, he shall be able to show, there is complete real evidence, that the rents of *Canisby*, from 1694 to 1709, were actually recovered by Provost *Clark*.

And, in the *first* place, As from the express terms of the trust-deed, the trustees were taken bound to render an exact account of

of their intrusions; and that, nevertheless, they failed to do so, though called upon judicially during their own lives; and that their successors have still declined and refused to exhibit any such account, resting only upon a positive denial of any intrusion whatever, which has been disproved: It is, therefore, humbly submitted, whether any factor or trustee, refusing to account, is entitled to insist in the *actio contraria*, for payment of advances pretended to have been made under the trust, which is the nature of the present action: and if the presumption of *intus habens ante redditus rationes*, does not apply as a total bar against such action.

But, 2^{da}. As the lands of *Canaby* were, by the decret of ranking in 1694, adjudged to the representatives of Provost *Cuthbert*, who were likewise assigned to the rents from *Whitunday* 1694, it must follow, that, either, 1^{mo}, The heirs of Provost *Cuthbert* entered into possession; or, 2^{do}, The family of *Alex* continued in possession; or, 3^{da}, The tenants possessed without paying any rents; or, lastly, *Clark* entered into possession, in consequence of the conveyances 1709 and 1712, and exacted the bygone rents due from 1694.

As to the first, it seems extremely clear, that *Phinds* himself, the heir of Provost *Cuthbert*, never entered into possession. Provost *Cuthbert*, the original creditor and adjudger of the estate of *Alex*, died in 1681, fourteen years before the date of the decret of ranking. By that decret, his heirs or representatives in general, are preferred in his place, without mention of any particular person. The Provost's nearest heir was his grandnephew, *John Cuthbert of Phinds*, who was a minor for many years after his grandfather's death: His affairs were neglected during his minority. When he came of age, he was weak, indolent and imprudent; and he never made up, in his person, a title to any of the subjects adjudged to Provost *Cuthbert's* representatives by the aforesaid decret of ranking and division: without which, it is not probable, that, upon so remote an apperency, he should have attained possession of lands in the distant county of *Cuthbert*.

It is farther to be remarked, that in all the proof which has been adduced in this cause, there does not occur, either any evidence, or even traditional account, that these lands ever were in the possession of *Phinds*. And, besides this, it is to be observed, that there have been recovered from the pursuer's debt, many of the

the accompts of *Alexander Cuthbert*, the tutor of *Plaids*, relative to the management of his pupil's affairs. These contain the accompts of charge and discharge betwixt the pupil and his tutor, down to 1697 and 1698, but make not the least mention of the lands of *Canisby*, or of any charge against the tutor, for the rents of them. These accompts were put into the possession of the pursuer's authors, for the purpose of calling his tutor to accomt, who accordingly took some steps towards it; but, notwithstanding this, and the intimate acquaintance which they had with the management of this tutor, as well as of the curators of *Plaids*, they have not produced the smallest evidence, to show, that the rents of *Canisby* were ever uplifted, either by *Plaids*, or by them; which, however, they could infallibly have done, had it truly been the case.

Plaids never even made an attempt towards getting possession of any of these funds. They were, *1mo*, The sum due by the Earl of *Cromarty*, for the lands purchased by him. *2do*, The sum due by *Sinclair of Ulbster*, for the lands which he purchased. And, *3tio*, The lands of *Canisby*.

That *Plaids* never attempted to get possession of the two first, is put beyond a doubt, by an original petition produced in process, which was presented to the Court of Session in July 1710, in the name of *John Cuthbert*, in order to have the bond granted by the Earl of *Cromarty*, and that granted by *William Innes*, for *Sinclair of Ulbster*, registrated, as no payment had been made by either of them. The original answers to this petition, are likewise produced; and the principal objection made to the demand of *Plaids*, is, that the respondents did not know any thing of his right to proovst *Cuthbert's* adjudication, and that he had produced no title to convey the debts to the several purchasers, upon payment. The petition was accordingly refused. This application, your Lordships will observe, was made by *Innes* and *Clark*, in the name of *Plaids*; so it is plain, that the poor gentleman himself, had never formerly thought of taking any such step.

In order to remove this difficulty, the trustees immediately made up a title in their own persons, by the above mentioned adjudication upon *Plaids's* trust-bond; and having thereupon adjudged, all the aforesaid subjects, they immediately recovered payment of the debt due by *Sinclair of Ulbster*.

This adjudication, it is to be remarked, was the only title ever made up to the lands of *Canisby*, or to the other subjects above mentioned, either in the person of *Plaids*, or for his behoof; so that these trustees had the only title of possession. *Plaids*, in

this case, had no title upon his apparenay; for although it is true, an apparent heir has a good right to continue the possession of his ancestor, yet here, provost *Cuthbert* never was in possession; and even when these subjects were adjudged to his representatives, it was so in general, without specifying who these representatives were; so that it was absolutely requisite, to establish a title, by service or adjudication, before any possession could be obtained.

It has been observed, that the first deed granted by *Plaid* to *James* and *Clark*, was a factory, dated 15th *August* 1709, which is in process, and specially empowers his trustees, to intromit "with all debts, sums of money whatsoever, and others, any manner of way due and alledged to me, whether heritable, real, or moveable, by an noble and potent Earl, *George* Earl of *Granary*, Sir *James Sinclair* of *May*, and the tenants and possessors of the lands of *EAST-ER Cambray*, sometime belonging to the said Sir *James Sinclair*." By the decret 1694, there were adjudged to the heirs of Provost *Cuthbert*, the lands of *Cambray*, holding of the crown, which distinguish them from the lands of *East Cambray*, which held of the bishop of *Cathness*. So ignorant, however, was *Plaid* in 1709, whether the lands adjudged to him were *East* or *West Cambray*; that, in the factory just now quoted, he calls them the lands of *East-Cambray*. The trustees soon informed themselves better; for, in their adjudication upon the trust-bond 1710, these lands are specially denominated the lands of *West-Cambray*, which is their true description. Besides this circumstance, the above-recited clause of the factory, seems plainly to import, that *Plaid* himself had never recovered the bygone rents of these lands, and that he was even uncertain, whether they were in the natural possession of *Sinclair* of *May*, or in the possession of tenants. If he had ever uplifted any of the rents, he would have probably mentioned, in this factory, the particular period from which he authorized his trustees to receive them: He mentions them, however, in general, and puts them in the same class with the debts due by Lord *Granary* and *Usher*, which, it has been shown, had not then been paid.

Having, therefore, all these circumstances together, there seems good reason to conclude, that *Plaid* never entered into possession, or uplifted any of the rents of the lands of *Cambray*.

And, there seems as much reason to conclude, that the family of *Sinclair* of *May* did not continue in possession of them after the

the decret of ranking and division. It is a well known fact, and will not be disputed, that the judicial sale of the estate of *Mey* was managed and conducted by the Earl of *Cromarty*, in concert with the family of *Mey*, with which he was nearly connected. Immediately after the purchase, the Earl reconveyed to the family, the greatest part of the *Caitheffs* estate, under a strict entail, under which they possess to the present day. As, therefore, the sale was a measure concerted for the benefit of the family, and as they willingly gave up the lands of *West Canisby*, in extinction of the balance of Provost *Cuthbert's* debt, without any such demand being made, it is by no means likely, that they should with-hold the possession from the person to whom the lands were adjudged. The family of *Mey*, after the sale, considered the disposition from the Earl of *Cromarty*, as the sole title to their estate: And accordingly, in a tack from the Laird of *Mey* to the minister of *Canisby*, in 1697, which is in process, it is expressly narrated as their title. It is, therefore, not probable, that they would assume the possession of the lands of *West Canisby*, which were not comprehended in the Earl of *Cromarty's* disposition, but adjudged to another person. And further, to show that the tenants could not be obliged to pay to any other persons than those having right by the decret of ranking and division, a process of multiple-poiding, which was brought by the tenants, is repeated in the process of sale and division, and conjoined therewith, and decret pronounced therein accordingly. And in confirmation of all this, Mrs. *Margaret Sinclair*, an old lady of that country, aged 84, depones, " That she does " not think, nor did she ever hear that these lands were possessed " by any of the Lairds of *Mey*, since the sale." And Sir *John Sinclair* of *Mey*, after having carefully searched his family-papers, the rentals of his estate, accout-books with factors, &c. betwixt 1696 and 1710, being examined as a haver, has deponed, that he could not discover any evidence of their possession or intromission, with the lands of *Canisby*, during that period. Indeed, the circumstance above-mentioned, of Provost *Clark's* enquiring so particularly, how long the Lairds of *Mey* uplifted the teinds, seems pretty plainly to import, that he did not uplift the rents.

310, That the tenants themselves should, for no less than sixteen years, be allowed to possess the whole estate without paying or being afterwards made accountable for a shilling of rents, is surely a most improbable supposition. That they did not pay
their

their rent, either to the representatives of Provost *Cuthbert*, or to the family of *Mei*, has been already shown. And it is further to be observed, that one of the defender's own witnesses, *George Abbot*, lately examined, deposes, " That the deponent heard " some old tenants in the lands of *W. I. Campbell*, particularly *Peter Swamy* and *Thomas Dunnet* say, that they were for several " years that they paid no rent out of these lands: They mentioned seven or eleven years, the deponent does not recollect, " which was before Sir *Patrick Dunbar* got possession." And Mr. *James Prodie*, minister of *Canishy*, deposes, " That he heard " some of the tenants, and some other people, make mention of " *James of Balam*, *Cuthbert of Castlehill*, and Provost *Clark*, as " having had some connection with these lands, before Sir *Patrick Dunbar's* time; and that the deponent heard them say, that for a " certain number of years, which some of them called eleven, some " thirteen, and one of them sixteen years, that they paid no rents, " which was likewise before Sir *Patrick Dunbar's* time." That these years during which they paid no rent, must have been before 1729, when *Clark* entered into possession, seems plain, from the clear written evidence above-stated, of his regularly uplifting the rents by a factor, from his entry, to 1719.

The question then is, Were the tenants made accountable for the bygone rents by Provost *Clark* when he entered into possession? or, Were they never called to account, but suffered to pocket them? That the former was the case, may be justly concluded, from the following circumstances.

1st, There are in process, two bills drawn upon two of the tenants for the rents 1718 and 1719, by the factor for Provost *Clark*; and, at the same time, it appears from the decret of division, that these two tenants were possessors in the years 1694, and 1695: And the same thing appears, from the bills of tenants mentioned in the whole of *William Campbell's* clearances with them, and in the letters between him and Provost *Clark*. It is hardly to be supposed, however, that these very tenants would have been allowed to continue in possession, if they had not paid up their bygone rents.

2^d, From provost *Clark's* letter to his factor, Clerk *Campbell*, dated 7th Mar 1711, wherein he writes, " I'll send you instructions " against the 11th of June, for prosecuting the bygone rests;" his intention to recover every thing due by the tenants, most clearly appears. And, from another letter, dated 2d April 1711, where-
in

in he writes, " You'll get me notice, how long the Laird of *Mey* " drew the teinds ;" the accuracy with which he examined every thing relative to the state of the lands, before his own entry, is sufficiently manifest.

3tio, Provost *Clark*, and the other trustee, *Innes*, were exceedingly alert in getting possession of every fund belonging to *Plaids*. In 1710, we find them petitioning the court of session, to have Lord *Cromarty's* bond, and *William Innes's* bond registrate. When they failed in this, because *Plaids* had no title in his person, they, with all dispatch, proceed ; and, upon a trust-bond for 50,000 merks, adjudge from him his whole subjects. So early as the 6th and 24th November 1710, they get payment of the sum due by *William Innes*, and *Sinclair of Ulbster*, as is established by evidence in process ; and the title by which they conveyed that debt to the purchaser, with consent of *Plaids*, was the adjudication on his trust-bond in July preceeding. There were various circumstances, unnecessary to be mentioned, which, notwithstanding some attempts made to that purpose, prevented their getting payment of Lord *Cromarty's* debt, before *Castlehill* brought the process of compt and reckoning against them, in the 1713 ; particularly, certain counter-claims founded on by his Lordship : But their anxiety to recover payment, is sufficiently evidenced by their petitioning the court to have his bond registrate. It has been already shown, that Provost *Clark*, after the trust-conveyance immediately took possession of *Canisby* ; and, when his anxiety and attention to make it turn to the utmost account, and all other circumstances, are considered, there seems little room to doubt, that he took care to exact all bygone rents due by the tenants.

Such is the evidence, from which the defender humbly apprehends, it is just to conclude, that Provost *Clark* recovered the bygone rents due from 1694 to 1709. If, indeed, the pursuer could show, that, during that period, the rents were uplifted by some other persons than Mr. *Clark*, it would, no doubt, overcome this evidence. But, if that is not shown, it is apprehended to be just to conclude, that he did recover them, and must therefore be held accountable for them.

The pursuer has repeatedly argued, that by the terms of her author's original trust-right, she is not liable for omissions, but only for actual intromissions ; and she therefore contends, that she cannot be accountable for these rents, except in so far as the

defender shall instruct the extent of her actual intromissions therewith. But the question here, is not with respect to any neglect or omissions upon the part of *Innes* and *Clark*, but merely whether there is satisfying evidence of their possession or intromission. In place of discovering any mark of omission in these trustees, there is plainly shown the most anxious attention to get possession of every possible fund. If, indeed, the pursuer would show, that they omitted to recover the bygone rents, or that they suffered some other person to run away with them, even without any title, that would be, properly speaking, an omission or neglect, for which the terms of their trust-right might exempt them from being accountable. But the memorialist apprehends, that the present question, with respect to the proof of their possession, or intromission, falls to be determined by the common rules of evidence; and that the particular terms of their trust-right, with regard to omissions, cannot have any influence.

The pursuer has alledged, that the right granted to *Innes* and *Clark*, was a right in *security only*, which did not oblige them to enter into possession, and has rested much upon the presumption arising from the nature of her right. In the humble apprehension of the memorialist, however, the nature of their right affords the strongest reason to presume their having actually possessed these lands. The nature of these conveyances has been fully set forth and explained in the beginning of this memorial. In place of being rights in security only, they are mere factories, each of them containing the provision of a salary, and, consequently, importing an obligation upon the trustees to intromit with the subjects disposed. They contain farther, an obligation upon the trustees to communicate to *Phelps* the cases or compositions which they should obtain at transacting with his creditors; and one of them contains an express obligation to bring the subject of the appraisings against the estate of *Mey*, to a period and conclusion, either by a friendly agreement, or by intending and following such a legal process against all parties concerned, bearing date the 17th 1701 and the lands of *Cambridge* are surely part of the substance of these appraisings. Besides all this, their different deeds authorize the trustees to retain the payment of the sums which they should advance, either to *Phelps* himself, or in payment of his debts, out of the first and readiest in their intromissions. It is

is not therefore presumable, that they would have made intromissions beyond the funds in their hands.

From the accomptant's report and the evidence in process, it appears, that none of the advances for which they demand credit were made before the year 1709; and it appears, that the whole of the principal sums which they at any time advanced, did not much exceed 8000 *l. Scots*, stating their advances at the full amount, independent of any cases they might have got, which the defender is now disappointed of the opportunity of investigating. On the other hand, it is proved, they got payment of the debt of about 2000 *l. Scots*, due by *Sinclair of Ulbster* in the 1710. There is reason to suspect, that, about the same time, they sold and got the price of some burgage tenements belonging to *Plaids*, in the town of *Inverness*, although the defender has not been able to bring legal evidence thereof. It has been proved, that in 1709, provost *Clark* got actual possession of the lands of *Canisby*; and it is hoped, there is likewise sufficient evidence of his having recovered the arrears of rent due from 1694. Before, therefore, the trustees made any advances for *Plaids*, they had funds in their hands, not only equal to, but even exceeding the extent of these advances: And therefore, considering all these circumstances, together with the nature of their right, it is humbly submitted, that the legal presumption of their advances being actually made out of the subjects in their possession, must apply with great force; and, in place of any presumption arising from the nature of their right, against their possession of the lands of *Canisby*, it must, on the contrary, be from thence clearly concluded, that they not only possessed, but uplifted the rents due from 1694, and made all their advances out of that, and the other funds in their hands.

The pursuer will not allow circumstantiate evidence to have the least weight in this question. It is apprehended, however, that the proof upon the part of the memorialist, will be required, stronger or weaker, in proportion to the distance of time of the intromission to be proved, and the nature of the evidence possible to be attained. With regard to the intromissions of the very distant period now in question; witnesses are not to be found, because no longer alive. Writings have disappeared by the injuries of time, in passing through a succession of different hands. But it has been proved, that neither the family of *Mey* continued in possession

possession, nor did *Plaids* ever enter into possession; that the decreet 1694, with all right following thereupon, was conveyed to the trustees; that one of them immediately thereafter entered into possession; that he visited the estate, placed a factor upon it, after having minutely enquired into the state and condition of the tenants, and bygone possession, and exerted all his activity to make it turn to the utmost account; that he granted a special factory for prosecuting the bygone rents, or, at least, proposed to do so, if that should be necessary: And, after all this, we find the same tenants continuing to possess in 1718 and 1719, that were in possession in 1694 and 1695. Surely, the unavoidable conclusion from all this is, that these tenants had paid up the bygone rents; and that provost *Clark* was the person to whom they were paid.

And if there should appear any dubiety in this evidence, it is apprehended, there are several strong circumstances arising from the conduct of this pursuer and her authors, which should make it be held complete and sufficient in the present case.

1mo. When, from the lapse of time, evidence becomes defective, it is a circumstance meriting examination, from the negligence of which party that defect has arisen, that the disadvantage from the uncertainty of the evidence may rest upon the party who has been negligent. In the present case, it is submitted, whether, if there is any uncertainty, the pursuer ought not to suffer thereby, who delayed prosecuting for this debt upon the estate of *Cromarty*, and, after neglecting it for more than fifty years, and after allowing the defender and his authors, by their diligence and attention, to make it effectual, would now endeavour to deprive them of their just acquisition.

2da. It is apprehended to be a certain maxim, that when a party has judicially given a positive denial to facts which are afterwards clearly proved, every thing may with justice be presumed against them. Such, however, has been the conduct of the pursuer in the present case.

From the very beginning of this process, the pursuer has refused to give any account of her intromissions, and has most obstinately denied the intromission or possession, either of herself or her authors, with any, even the least article of the effects of *Plaids*, excepting Sir *Patrick Dunbar's* possession of *Cannibie* from 1719, which, indeed, it was simply impossible to deny. This conduct

is the more inexcusable, that she is the daughter and universal disponee of Sir *Patrick Dunbar*, and in possession of all his papers, as well as the papers of Provost *Clark*. Notwithstanding all which, she, from the beginning, refused to give any account of charge and discharge; evaded the appointments of the court to that purpose; and used every possible method to hurry on the final decision, in order to prevent the defender from bringing that evidence which he has since obtained.

By the decret of ranking of the creditors of *Mey*, the heirs of Provost *Cuthbert* were ranked on the price of the lands purchased by *Sinclair of Ulbster*, for the sum of 1075 *l.* 12 *s.* 4 *d.* *Scots*, with interest thereof from *Whitsunday* 1694. As the trustees, *Innes* and *Clark*, had uplifted this sum in 1710, the defender insisted, that the pursuer should be charged therewith. This the pursuer violently opposed, denying, with great confidence, that the trustees had intromitted with it; till at last, the defender had the good fortune to discover the conveyance of this debt by them to *Ulbster*, upon payment, dated 6th and 24th *November* 1710. In like manner, she has been pleased, very positively to deny all possession of, or intromission with, the rents of *Canisby* before 1719; whereas, it is now clearly instructed, by written evidence, that Provost *Clark* had possession from the date of the trust-conveyance to 1719. These averments of the pursuer, when now so clearly contradicted, must appear the more extraordinary, that her father, Sir *Patrick Dunbar*, who was a man of great accuracy in business, and intromitted with the victual-rent of *Canisby*, by authority from Provost *Clark*, for at least one of the years between 1709 and 1719.

The pursuer gave in a paper of two or three pages to the Lord Ordinary, containing some observations upon the proof lately adduced; but they are of such a nature, as hardly to merit a serious refutation. It is pretended, that, at any rate, she can only be liable for the precise sums mentioned to have been received in Provost *Clark*'s letters to his factor, *Campbell*; but the pursuer forgets, that the object of the proof at present under consideration, is not the extent of the rents of *Canisby*, but the fixing Provost *Clark* to have been in the actual possession; which will necessarily make him accountable for the whole rents, whatever their extent might be. It is said farther, that there is reason to presume, these rents were paid over to *Plaids* himself, because, in one of the letters, Provost *Clark* says, " Being to state accompts

“ shortly with *John Cuthbert*, you will send me a particular account of the payments you have made me of the rents of *Canishy*.” The pursuer does not advert, that this letter is dated in 1714, and that this passage relates to *Casslehill*’s proceeds of compt and reckoning, which had been raised in 1713. Besides, there is evidence, that in 1713, *Plaids* had been imprisoned at *Aberdeen*; and there is no appearance of any payment or advance made to him by the trustees, posterior to that period, having only obtained his liberation, by pledging *Casslehill*’s back-bond with his incarcerator.

To conclude, therefore, it is humbly hoped that your Lordships will be satisfied, upon a review of the whole circumstances of this case, that every thing advanced by these trustees, was out of the effects of *Plaids*, which they got into their possession. If that had not been the case, and, if it had not been understood, that their intromissions even exceeded their advances, a second trust-right would not have been given to *Casslehill* so early as 1713, to call them to account, and to oblige them to denude: Nor would *Casslehill*, so quickly as he did, have brought his process against them, and have used inhibition and arrestments upon the depending action. If it had not been from a consciousness of being greatly overpaid, and from a desire, if possible, to keep quiet and unmolested possession of *Canishy*, and the other subjects they had got, these trustees would not, for so long a time, have neglected to pursue for this debt due by the Earl of *Cromarty*, nor would they have allowed the defender’s author to proceed, without interruption, to get that claim sustained, and to vest the right to it in his person. The pursuer, trusting perhaps to the intromissions of her authors being forgot, has at length been hardy enough to attempt to recover the debt upon *Cromarty*, by wresting it out of the possession of the defender. But it is hoped, that, notwithstanding the great distance of time, and the care of the pursuer, to conceal every thing with regard to her author’s intromissions, they will fully and honestly appear, and will fully show how little foundation there is for the present action.

Argues Robert, &c.

ROBERT CULLEN.

Copy of the Writings found in the Repositories of *William Campbell*, Sheriff-Clerk of *Caithness*, transmitted to this Process by the Sheriff of *Caithness*, in consequence of an Act and Warrant for searching the said *William Campbell's* Repositories.

Aff. Cousin,

I Had writ to you before now. but that I wait some returns from Edinburgh, which I expect by the first post: I shall then write fully to you. You'll get me notice, how long the laird of Mey drew the teints; if I mind right, the tenants declared it was only two years since he gave over drawing them, &c.

Alex. Clark, to
Will. Campbell.
April 3. 1711.
No. 3.

Aff. Cousin,

I'M very much obliged to you for the concern you take in every thing I recommend to you, and shall very gratefully repay your civility. I agree, that *Patt. Swanay's* sone shall get what *Tho. Grott* posselt, and endeavour, if possible, to cause him take *Williamson's* possession; for I'll not continue him longer in it. I'll send you instructions against the first of June, for prosecuting the bygone rests: And as to the present ferme, I, by these, assign the sam to you, at the country price.—I send *Bowermaden*. an answer to your joint letter, &c.

Ditto to Ditto.
May 7. 1711.
No. II.

SIR,

I Received yours, giving account, you can have four pounds for the boll of the rents you have received, *Candlemes* payment, and five merks on a shorter day. You'll sell it at the four pounds, &c.

Ditto to Ditto.
Sept. 10. 1711.
No. III.

SIR,

I Received from *Alexander Oman* fourscore pounds Scots moe, which shall be allowed you at compting. You'll tell the tenants of *Cannisbay*, to labour the three-farthing-land as formerly.

Ditto to Ditto.
April 8. 1712.
No. IV.

b. I shall send you a formal faculty to compt with the tenants, and to receive what money they have been offering you, &c.

SIR,

*Any Clerk to
V. C. 1772
No. VI.*

I Told you when you was here, that you should sell the victual in hands of the tenants of Cannisbay to the best availe; and I do now, by these, impower you to sell the same, not doubbing but you'll draw as much for it as the victual of that parish sells at, &c.

SIR,

*Any Clerk to
V. C. 1772
No. VI.*

THE wine cannot be sold cheaper than 18 lbs. the red, and 16 lbs. the white. I assure you, if any other got it cheaper, you'd get it. The term of payment is six months; so that if you incline for any, send an order to send you what you want, as above.—I cannot get a boat; but doubt not there may be one gott about you, or in Orkney; and if the tenants in Cannisbay procure one, I'll pay the freight at a reasonable rate, offering to 50 bolls, and will provide them in the timber and bark you writt of; and acquaint me immediately if a boat can be got, &c.

Aff. Cousin,

*Any Clerk to
V. C. 1772
No. VI.*

I Am very well pleased with the bargain you have made of the victual in Cannisbay, and shall never doubt but you shall always doe profitably for my interst, as you may depend I would doe for you, &c.—If the tenants of Cannisbay had come here with a boat, as you writt, I had bought them some timber, &c.

SIR,

*Any Clerk to
V. C. 1772
No. VI.*

YOU have been misinformed as to my giving my right of Wester-Cannisbay. I wish I had a good merchant for it, for I think Mr. Cluthbert will never be my merchant. Pray, acquaint me who informed you; and if you have received any of the rents, remit it, and I'll send you a receipt for the same. I design to see you shortly, and will doe all I can, by help of friends, to have that business in better order than I could have done hitherto, &c.

SIR,

SIR,

I Have received from the post, five pounds ten shillings Ster-
line, which I'll allow you at compting: I wonder that you
should refuse what money the tenants offered you; for, whoever
would receive it from you, should thank you, that it did not
lay in their hands to be squandered, as you writt; yet I fancy
they have not been so foolish, and that they'll deliver it you on
demand, otherwise they'll repent it in a little time. Send me
account what victual is worth with you, and how much bear
they'll deliver, &c.

Alex. Clark to
Will. Campbell.
June 22. 1711.
No. IX.

SIR,

I Received four pounds Sterline, which I shall allow you at
compting, &c. Pray take the most reasonable course you
can with the farms of Cannisby. I thought the tenants used al-
ways to malt it; and if they have done so this year, before
the 24th of June last, you'll have no difficulty in disposing of
it, &c.

Ditto to Ditto.
July 28. 1713.
No. X.

SIR,

Being to state accompts shortly with John Cuthbert, you'll
send me a particular account of the payments you have made
me of the rents of Cannisby, and a particular account of the
payments made you by the tenants. If there is any money in the
hands of the tenants, or your own, of the last year's crop, and
preceedings, pray send it, &c.

Ditto to Ditto.
Feb. 24. 1714.
No. XIV.

SIR,

I Received from the post, fifty-five pounds five shillings Scots
money, in part payment of what is due by the tenants of Can-
nisby. Pray send me an account of the particular payments made
by them to you, &c.

Ditto to Ditto.
Oct. 19. 1714.
No. XII.

WILLIAM

Unfolded ac-
count of Wil-
liam Camp-
bell's account of
his and Pro-
vost Clark's
account of Camp-
bell 1712-
1715

WILLIAM CAMPBELL Dr. to Provost CLARK.

	B.	f.	p.	L.	s.	d.
To the farm of Wester Cannisby and Mar- tinmas debt 1712, is — — —	46	2	0	55	5	0
To farm and Martinmas debt 1713 — — —	46	2	0	55	5	0
To ditto, anno 1714 — — —	46	2	0	55	5	0
To ditto, anno 1715 — — —	46	2	0	55	5	0
	232	2	0	276	5	0

Per contra,

Cr.

	B.	f.	p.	L.	s.	d.
By cash paid to Provost Clark, as per his several letters acknowledging the same, in all — — — —				299	5	5
By ditto to Peter Sinclair, for executing summons at Mr. Cuthbert's instance, a- gainst old Mey, per receipt — — —				7	4	0
By two years ferme given by the Provost's order, one to Bowermaden, and another to Mr. Frazer — — — —	93	0	0			
By cash paid to Mr. Gibton and victual, in part of the stipend of Wester Cannisby, as per receipt — — — —	26	3	0	38	1	0
By refts of rents due by the tenants, as per particular account — — — —	99	0	0	75	10	0
	218	3	0	370	0	0

N. B. This account seems to be in the hand-writing of James Campbell, the son of William

On

On the back of the foregoing accompt is the following jottings,
in William Campbell's hand-writing.

*The stipend of Wester Cannisby, conform to decret of augmentation
and localitie, dated 16th June 1708.*

				B.	f.	p.	l.	L.	s.	d.
Item of victual	—	—	—	3	3	3	2 $\frac{1}{4}$			
Item of money	—	—	—	—	—	—	—	5	10	4

*Note of receipts of stipend paid be the tenents of Wester Cannisby to
Mr. Gibson.*

				B.	f.	p.	l.	L.	s.	d.
Peter Suany, per receipt, dated 11th June 1716, of money	—	—	—					09	12	2
And of victual	—	—	—	6	3	2	0			
Thomas Dunet, of money	—	—	—	6	3	2	0	09	12	2
Mathew Dunnet's relief	—	—	—	6	3	2	0	09	12	0
Donald Williamson	—	—	—	4	1	2	0	05	07	0

ote of pay-
ents made by
William Camp-
bell to Provost
ark, since
e year 1711,
r his letters.
No. XIV.

	B.	p.	f.	l.	L.	s.	d.
By cash received from Alexander O- mand, per letter dated 8th April 1712	—	—	—	—	6	13	4
By ditto from the Thurfso post per dit- to, 22d June 1713	—	—	—	—	5	10	0
By ditto, per letter, dated 28th July 1713	—	—	—	—	4	0	0
By ditto, per letter, dated 19th Octo- ber 1714	—	—	—	—	4	12	1
By cash given to Peter Sinclair, for ex- ecuting of ane summons at Mr. Cuthbert's instance, against the old Laird of Mey, per receipt, dated 10th October 1716	—	—	—	—	0	12	0
By victual paid Mr. Gibson, in part payment of his stipend, per receipt, dated 18th November 1712 years, given by Matthew Dunnet,	—	—	—	—	4	1	0

Carried over,

B

4	1	0	0	21	7	5
---	---	---	---	----	---	---

By

	B.	f.	p.	l.	L.	s.	d.
Brought over,	4	1	0	0	21	7	5
By ditto, per receipt, dated 8th March 1714 — — —	0	3	2	0			
By cash paid ditto, per receipt 12th December 1711, including former receipts — — —					0	9	9½
By money and victual paid ditto, by Peter Swannie, per receipt, 11th June 1716 — — —	6	3	2	0	0	16	2
By ditto, paid by Donald Lyell, per receipt 11th June 1716 — — —	3	2	0	0	0	10	4
By ditto, by Denald Williamson, 11th June 1716 — — —	4	1	2	0	0	8	11
By ditto, by Thomas Dunnet, 17th June 1716 — — —	6	3	2	0	0	16	2
	26	3	0	0	24	10	10½

M. B. The preceeding accompt in the hand-writing of James Campbell, the son.

Original
in
the
possession
of
the
Rev.
Mr. A. S.

AT Seater, the twenty fifth day of October 1716, compted with Peter Swanie, in Wester-Cannibay, and he payed money for 5 octos of land, Mertinmas 1712, 1713, 1714, and 1715, at 9 l. 4 s. 2 d. and the victual-rent at 7 bolls 2 filots for crop 1710, 1711, 1712, 1713, 1714; and he rests yet the ferme crop 1715, and the current crop 1716, and the ensuing Mertinmas debt, whereon I granted receipt, allowing what he paid to the minister.

	b.	f.	p.	l.		l.	s.	d.
Perme crop 1717, 31	7	2	0	0	Next debt 1716	9	4	0
Perme crop 1716, 11	7	2	0	0	Next debt 1717	9	4	0
Perme crop 1717	7	2	0	0		18	8	0
	21	0	0	0				
Debt, as divided paid to my father 1716	7	2	0	0	Remains 15 l.			

Donald Williamson labours 3 film. for Mertinmas 1712, 1713, 1714, 1715, and 1716, and payes eleven pound one shilling money, and 9 bolls victual; he rests only Mertinmas debt 1715, and

13 bolls old refts, and the ferme 1715 and 1716, allowing what he paid to the minifter.

	b.	f.	p.	l.		l.	s.	d.
Old refts	13	0	0	0	Mart. debt 1715	11	1	0
Ferme 1715	9	0	0	0	Mart. debt 1716	11	1	0
Ferme 1716	9	0	0	0	Mart. debt 1718	11	1	0
	31	0	0	0		33	3	0
Got from him to fow Don. Lyell's land, 1 b. 3f.	1	3	0	0	Ded. Mart. 1715 pd.	11	1	0
	29	1	0	0		22	2	0

Thomas Dunet, for five octos, for Martinmas 1712, 1713, 1714, and 1715, at 9 l. 4 s. 2 d. and the victual at 7 bolls, 2 firlots, for the first three years, and for an octo more, for 1713, 1714, 1715, and 1716, and refts only fix pecks of victual for by-gones, and the ferme of five octos, for crop 1715, and the hail of three fdm. for 1716, allowing what he paid to the minifter, per receipt.

5th January 1717, received payment for meat, lamb, and 2½ geefe.

Thomas Dunnet betwixt himself and his son, 3 fdm. land for 1717, which is 11 l. and 9 b.

	b.	f.	p.	l.		l.	s.	d.
Ferme of 5 octos possessed by him 1717, is	7	2	0	0				
Ferme of 3 fdm. land 1716 is, and Mart. debt 1716	9	0	0	0		11	1	0
Ferme of ditto 1717, and Mart debt, is	9	2	0	0		11	1	0
Of old refts	0	1	2	0				
	26	1	2	0		22	2	0
Deduce, as alledged paid by him to my father,	8	2	0	0				
	17	3	2	0				

Matthew Dunet's relict laboured 5 octos for Martinmas 1712, 1713, 1714, 1715, and payed 9 l. 4 s. 2 d. and 7 bolls, 2 firlots victual, for crop 1710, 1711, 1712, 1713, 1714, 1715, and 1716; and still refts four bolls fix pecks victual for old ferme, and the ferme 1715 and 1716.

	b.	f.	p.	l.
Old refts	4	1	2	0
Ferme 1715	7	2	0	0
Ferme 1716	7	2	0	0
	19	1	2	0

George Muat laboured in 1713 and 1714, two octos, and in 1715 and 1716, three octos, and paid the haill money rent, and reils eleven bolls victual, for 1716 and preceedings.

His poffeffes and labours 4 octos, 1717; each octo pays 1 l. 16 s. 6 d. and 1 b. 2 f. victual.

	<i>l.</i>	<i>s.</i>	<i>d.</i>		<i>l.</i>	<i>s.</i>	<i>d.</i>
<i>Due for fenne 1716 and preceed.</i>				<i>Mort. debt 1716</i>	5	10	6
<i>(1717)</i>	11	2	0	<i>Mort. debt</i>	7	7	8
<i>From 1717</i>	6	3	0				
	17	2	0		12	18	2

Donald Lyell, for 1712, 1713, and 1714, labours three octos, and pays of money, 5 l. 10 s. 6 d. and of victual, 9 bolls, 2 firlots; for 1715 and 1716, 5 octos, and reils Martinmas debt 1715.

N. B. The preceeding account of the clearance with the tenants, is in the hand-writing of *William Campbell*, except what is in Italics, which seems to have been afterwards interjected by his son *James*.

I John Earl of Breadalben, &c. principal sheriff of Caithness, sheriff officers, &c. their presents seen, ye lawfully summon, warn, and charge Peter Swany, in Caithy. Donald Swany there, Thomas Dunnet there, Donald Lyell there, George Muat there, Andrew Muat there, Janet Groat, relict of unquhile Matthew Dunnet there, Malcolm Groat in and Donald Williamson, in Wester Caithy, to compare before me, of my disputes, within the recesseth of, or counterpart of Thairis, the twenty seventh day of July instant, for the first diet, and the last day of the said month, in the hour of sunis, for the second diet, to answer at the instance of Mr. Alexander Clarke, late pursuor of liveryments. That is to say, &c. Given the 23d July 1747, and signed by the said William Campbell.

N. B. This summons was execute against the several defenders within, as appears from the execution thereof, dated 25th July 1747, but does not appear to have been libelled or called in court.

able ac-
mpt of pro-
Clarke's
ants, of
pt 1714.
o. XVII.

A note of farms received from Provost Clarke's tenants in the parish of Canisby, cropt 1714.

	B.	f.	p.	B.	f.	p.
From Patrick Swanie, put in the ships				7	2	0
From Thomas Dunnet, put in the ships				8	0	0
From George Mowat, lofted —	4	0	1			
From Donald Williamson, lofted —	7	2	1			
From Donald Lyell — —	5	2	0			
From Matthew Dunnet — —	6	2	0			
	<hr/>					
	23	2	2			
Allowance of this 2 pecks for lofting of each boll, by reason they brought it not timeously to the ship, with the two first that delivered there, makes				3	0	0
Remains to them to compt for —					20	2 2
				<hr/>		
				35	0	2

There is 6 bolls paid to provost Clarke, in his receipt, more than is received, at 7 merks *per* boll.

Ane account of geese.

note of the
e of Can-
y, belong-
o baillie
k, 1711.
o. XVIII.

Imp. 6 from Peter Swannie.
It. 7 from Thomas Dunnet.
It. 7 from Donald Williamson.
It. 7 from Matthew Dunnet in Canisby.
It. from Donald Leall, 15 s. for 3 geese.
It. from Thomas Dunnet, 13 s. 4 d. for a lamb.
It. from Donald Williamson, 13 s. 4 d. for another lamb.

	Cocks.	Hens.
Imp. Matthew Dunnet	2	5
It. Donald Williamson	4	4
It. Thomas Dunnet	3	5
It. Donald Leall	3	3
It. Peter Swannie	3	5
	<hr/>	
	15	22

Mistress,

I was complaining to my master the last day that he was here among us, how I was hindered from an acre of land, which belongs to me to have, by Thomas Darnet and his family. There is odd land in the town, which our master desired them to labour: They are so contentious, they will not do that, and says, that they will keep it, let the master and me say what we will. And all the town knows, that it belongs to my labouring; and after my master desired me to keep it, I paid ten shillings of good money to John Bricht for it, and the rest of my land; and will pay what is due when called. So, mistress, I expect that my master will not wrong me, since all the town can tell that it is mine, and ever belonged to two hoofs that I have. No more to trouble you with, but does this to my master, and let him write to me to keep what is my own right to have. Mistress, when I come to the town, I shall reward you for this trouble in the worth of one pound of the debt of it. Donald Leah is coming up with his fowls, &c.

N. B. Helen Nowat was William Campbell's spouse.

SIR,

I have written you once or twice, but got no return. That I hear of the widow's is ready: what you have a mind to do with it, I know not: I am informed, that it will not be sold. The widow continues there as yet, but is ailing, as I am informed, to put any trifle that she has all that ground: but I have forbidden her to trouble us with any more. All you and this script, which she has presented to them. And as for James Darnet, if he can be let of that land in any manner or way, he will not labour. That tenant of Mey's that came your length is desolate of house and land alike, and is willing to labour in West Canby this season, and take house there at your hands, providing you shall him reward any thing. Mey has to say to him, for he rests him morning. If he were backed with the land, you might be easily well for Darnet, &c.

SIR,

I had your letter a while since with the bearer, but got no return as yet: whether it came to your hands or not, I know not. I would have written to you with your servant when he came

came from Stroma, but did not come my way. As I wrote in my last, and as the bearer will inform you, be at no less with Andrew Mouat; for he is to labour no land in West Canisby, as I am informed, this ensuing season. And as for Donald Lyel, you'll either order him to thrash his corn, that he may get straw to his beasts, or take some other course with him; for, according to your desire, I did allow on him as much victual as will pay what Marts. debt he should pay. And for Magnus Scarlet and Thomas Groatt, I did advertise them several times to come your length and clear with you; and has promised to do so, and that very thankfully. And as for Malcolm Groatt, he will not get that malt ready till after Christmas. The price of malt in this parish, as yet, does not exceed five merks and an half. I wrote to you fully in my last, as to the widow's corn and others. And now, seeing the land is parted to all their satisfaction, I think it proper you should know how the land is to be laboured this ensuing year; and what you are unpaid of the Marts. debt. that you may be paid, and the other customs; so wants your answer. But I must say, your tenants is so far out of custom to do what is just, that its hard bringing of them to it again, except you'll order other methods to be taken with them, that is not done as yet, &c.

S I R,

REceive your geese, and what is wanting on my part and Donald Leall's, we will pay in money, since we have none.

Missive George
Mouat to Wil-
liam Campbell,
31st October
1715.
No. XXIII.

An account of the victual paid to Bovermaden.

Peter Swannie paid	—	—	—	7 bolls.
Thomas Dunnet payed	—	—	—	7 bolls, 3 firlots.
Donald Williamson payed	—	—	—	6 bo'lls.
The widow payed	—	—	—	5 bolls.

As for my part, I had none this year; and the reason is, if you minde, I borrowed victual the other year from Mr. Gibson, for paying Donald Leall's part and Donald Williamson's, and I have gotten non from them as yet. *The tenants is thinking long for receipts; they got none for victual since your entry, &c.*

No. XXIV. is
the execution
of the sum-
mons above
mentioned.

No. XXV. The following jottings, relative to the lands of West Canisby, appear in an old blotter kept by William Campbell, marked No. XXV.

Note of ferme received from the tenants of Canisby.

					B.	f.	p.
From P. Swanie	—	—	—	—	6	0	0
From Donald Williamfon		—	—	—	5	0	0
From Mathew Dunet	—		—	—	5	0	0
From Thomas Grott	—		—	—	3	0	0
From Thomas Dunet	—	—	—	—	5	2	0
From Donald Lyell	—		—	—	2	0	0

Thurſd, 13th Auguſt, received from the tenants of Canisby, as follows.

					B.	f.	p.
It. from Donald Williamfon		—	—	—	7	3	0
It. from Mathew Dunet		—	—	—	8	0	0
15th Auguſt, from Donald Lyell in Canisby				—	4	0	0
From P. Swanie	—		—	—	1	0	0
From Thomas Dunet	—	—	—	—	1	0	0
From Mathew Dunet	—	—	—	—	1	0	0

Received of ferme, July and Auguſt 1712.

					B.	f.	p.
From P. Swanie	—	—	—	—	10	0	0
From T. Dunet	—	—	—	—	10	0	0
From Donald Williamfon		—	—	—	07	3	0
From Mathew Dunet	—	—	—	—	09	0	0
From Donald Lyell	—	—	—	—	04	0	0

To

To be deduced for malt-making.

							B.	f.	p.
XXV. inued.	P. Swany	—	—	—	—	—	1	1	0
	T. Dunet	—	—	—	—	—	1	1	0
	D. Williamfon	—	—	—	—	—	1	0	0
	M. Dunet	—	—	—	—	—	1	1	0
	D. Lyell	—	—	—	—	—	0	2	0
							<hr/>		
							5	1	0

							B.	f.	p.
	To P. Swany	—	—	—	—	—	8	3	0
	To T. Dunet	—	—	—	—	—	8	3	0
	Donald Williamfon	—	—	—	—	—	6	3	0
	Mathew Dunet, there being $\frac{1}{2}$ boll unfitted	—	—	—	—	—	7	2	0
	Donald Lyell	—	—	—	—	—	3	2	0
							<hr/>		
							35	1	0

Rental of Weſter Canisby, 3 d. 3 f. 0 $\frac{1}{4}$ oct.

						B.	f.	p.	B.	f.	p.
	T. Dunet, 5 octos	—	—	—	—	7	2	0	9	3	4
	Mathew Dunet, 5 octos	—	—	—	—	7	2	0	9	3	4
	P. Swany, 5 octos	—	—	—	—	7	2	0	9	3	4
	Donald Williamfon, 3 fdm.	—	—	—	—	9	0	0	11	0	0
	Donald Lyell, 3 octos, and three quarters of ane octo	—	—	—	—	5	2	2	06	17	0
	Thomas Groat, $\frac{1}{2}$ octo, the ley-land 5 $\frac{1}{2}$	—	—	—	—	0	3	0	00	18	0

D

Rental

Rental of Wester Canisby, 1717.

					<i>B.</i>	<i>f.</i>	<i>p.</i>	<i>B.</i>	<i>f.</i>	<i>p.</i>
Patrick Swany, 5 osets	—	—			7	2	0	9	3	4
D. Williamson, 3 fhm. land		—			9	0	0	11	0	0
Thomas Dunet, 5 osets	—		—		7	2	0	9	3	4
Mathew Dunet, 5 osets	—		—		7	2	0	9	3	4
Geo. Mowat, 4 osets	—	—		—	6	0	0	7	7	8
W. Dunet and And. Mowat, $\frac{1}{2}$ d. land					6	0	0	7	7	8
Gilbert Dunet, $\frac{1}{2}$ d. land	—	—			6	0	0	7	7	8
					<hr/>					
					49	2	0			

N. B. This last rental is of the hand-writing of James Campbell, the son of William.

13. Feb. 1711.

P. Swany, 8 fowls.
 Tho. Dunet, 8.
 D. Williamson, 9.

					<i>B.</i>	<i>f.</i>	<i>p.</i>	<i>B.</i>	<i>f.</i>	<i>p.</i>
P. S.	—	—	—	—	6	0	0	3	0	0
D. W.	—	—	—	—	5	0	0	2	2	2
M. D.	—	—	—	—	5	0	0	2	2	2
T. G.	—	—	—	—	3	0	0	1	2	2
T. D.	—	—	—	—	0	0	0	2	3	3
D. L.	—	—	—	—	2	0	0	1	0	0
					<hr/>					
					3	1	1			

<i>B.</i>	<i>f.</i>	<i>p.</i>
20	2	0
3	1	1
<hr/>		
23	0	3

S I R,

Missive George
Mouat to Wil-
liam Campbell,
without date,
but containing
a note of
fowls resting
1716.
No. XXVI.

S I R,

Ane accompt of fowls resting, 1716.

Janet Groatt rests four fowls.

Donald Williamson rests two fowls.

Thomas Dunnet rests two fowls.

Donald Leal rests the haill, which is eight.

Peter Swannie rests one fowl.

Donald Swannie was at John Dinnet, and Charles Crushale and George Omand, and none of them had a plant to themselves. If we know the day that Bovermaden will be in the town, we will come the length, and get receipts. Mind Peter Swannie's and Thos. Dunnet's receipts from Mr. Frazer, &c.

On the back of the above missive is the following note, which seems to be the hand-writing of James Campbell, the son of William.

Note of fowls received from the tenants of Canisby, 2d July 1716.

Impr. Donald Williamson, two fowls.

It. George Mouat, two ditto.

It. Thomas Dunet, two ditto.

Patrick Swanny, one fowl.

No. XXVII. *Follows twelve notes or jottings of the rentals of Camisby, and clearances with the tenants, some of them signed by the said William Campbell.*

No. I.

1712.						M.	s.	d.
Pet. Swannie	—	—	—	—	—	13	10	13
Donald Leal	—	—	—	—	—	8	3	4
Tho. Dunet	—	—	—	—	—	13	10	10
Mathew	—	—	—	—	—	13	10	10
Donald Williamfon	—	—	—	—	—	16	6	3

No. XXVIII continued.	1711.						L. s. d.		
	Mathew	—	—	—	—	—	9	10	10
	Donald Williamson	—	—	—	—	—	11	00	00
	Donald Leall	—	—	—	—	—	09	10	10
	George Mowat	—	—	—	—	—	05	10	00
	Thomas Dunet	—	—	—	—	—	09	10	10
	William Dunet	—	—	—	—	—	01	16	10
	Pet. Swannie	—	—	—	—	—	09	10	10

Delivered to Skipper Mackenzie's ship.

Peter Swannie, fix bolls and ane half.

Thomas Dunet, fix bolls and ane half.

Mathew Dunet, fix bolls and ane half.

Donald Williamson, 05 bolls and ane half.

Donald Leale, 4 bolls and ane half.

George Mowat, 9 bolls.

No. II.

Thursd, 16. April 1712. Received from the persons under-written upon Mr. Alexander Clarke his account, the sums following, viz.

	Scots.			M.	s.	d.
From Peter Swanie	—	—	—	13	10	10
From Donald Lyell	—	—	—	08	03	4
From Thomas Dunet	—	—	—	13	10	10
From Mathew Dunet	—	—	—	13	10	10
From Dod. Williamson	—	—	—	16	06	08
				<hr/>		
				Mks.	65	02 06

(Signed) *William Campbell.*

From George Mouat, for which I gave rec.	16	6	8
	<hr/>		
	81	9	2

No. III.

					L.	s.	d.
xxvii. inued.	Mathew Dunet, 5 octos, pays	—	—	—	9	4	2
	Dond. Williamson, 6 octos	—	—	—	11	01	0
	Dod. Lyell, 5 octos	—	—	—	09	04	2
	Geo. Mouat, 3 octos	—	—	—	05	10	6
	Thomas Dunet, 5 octos	—	—	—	09	04	2
	Item. for ane octo posselt by his son	—	—	—	01	16	10
	Item, Pet. Swannie, for 5 octos	—	—	—	09	04	02

Fifty-five pd. 5 shill. £. 55 5 0

Thomas Grott's half octo possessed by Magnus
Scarlet in Kirk-stile.

The foresaid sum received from the foresaid tennents for Mer-
tinmas 1712, by me, the 29th June 1713.

(Signed) *William Campbell.*

*Thurso, 2d October 1714. Received from tennents of Wesler Canisby,
for Mertinmas debt 1713, as follows:*

					L.	s.	d.
	Donald Williamson, for 6 octos	—	—	—	11	01	00
	Tho. Dunet, for 5 octos	—	—	—	09	04	02
	It. for his son's octo	—	—	—	01	16	10
	It. from Donald Lyell, for 5 octos	—	—	—	09	04	02
	Peter Swanie, 5 octos	—	—	—	09	04	02
	Geo. Mouat, 3 octos	—	—	—	05	10	6
	Mathew Dunet, 5 octos	—	—	—	09	04	2

Fifty-five pd. five shill. £. 55 5 0

(Signed) *William Campbell.*

No. IV.

A copy of No. III. likewise signed by the said William
Campbell.

No. V.

No. XXVII.
continued.

			<i>L.</i>	<i>s.</i>	<i>d.</i>
Donald Lyel, 3 octos, 8 mks. 3 s. 4 d.	—	—	4	2	0
16. April, paid the minister.					
Thomas Dunnet, 5 octos, 13 mks. 10 s. 10 d.	—		7	2	0
16. April 1712, paid the minister.					
Matthew Dunet 5 octos, 13 mks. 10 s. 10 d.	—		7	2	0
Paid the minister.					
Donald Williamson, 6 octos, 16 mks. 6 s. 8 d.	—		9	0	0
Paid the minister.					
		<i>M. s. d.</i>			
From Pet. Swanie	— — —	13 10 10			
Donald Lyel	— — —	08 03 4			
Thomas Dunet	— — —	13 10 10			
Mathew Dunet	— — —	13 10 10			
Donald Williamson	— — —	16 6 8			
		<hr/>			
		65 2 6	43	0	0

14. October 1712.

From George Mowat. for the 3 fdm. land that was ley, 16 merks
6 s. 8 d.

14. Oct. 1712. D. Gt. to my receipt of his money-rent, got from
Geo. Mowat, 18 s. Sterling.

The ley land, being 3 fdm. was imposed upon the tennents to labour amongst them. The growth of it was for three pts. thereof, twelve bolls whereof I got from Peter, 3 bolls bear, and 3 pund for a boll meal; and from Thomas Dunet, 3 bolls bear, and 3 pund for a boll meal; and from Mathew Dunet the like; and Donald Williamson and Donald Lyel refts the other four bolls betwixt them.

And they are as follows: Thomas Dunet 2 bolls ferme for oats and bear; Pet. Swaney two bolls, and Matthew Dunet two bolls.

No. VI.

No. XXVII.
continued.

Donald Williamson rests for 5 years, 45 bolls.

1710, p.	—	L.	5	0	0
1711, p.	—		7	3	0
1712,	—		5	2	0
			7	2	1
<hr/>					
			26	3	1

No. VII.

Rental of Cannisby is 3 d. 3 f. $\frac{1}{2}$ octo ; ilk d. pays of victual 12 bolls and 14 l. 14 s. 8 d. money

29. June 1713.

Matthew Dunet, for 5	L.	s.	d.		B.	f.	p.	l.
octos — —	9	10	10	and victual	7	2	0	0
Donald Williamson for								
6 octos — —	11	0	0		9	0	0	0
Donald Lyel for 5 octos	9	10	10	and for 3 octos	4	0	0	0
Geo. Mowat for 3 oc-								
tos — —	5	10	0	and for 3 fdm.				
				1712	9	0	0	0
Thomas Dunet for 5								
octos — —	9	10	10		7	2	0	0
And for 1 octo posses-								
sed be his son for								
that year —	1	16	10					
Pet. Swany for 5 oc-								
octos —	9	10	10		7	2	0	0
<hr/>								
	56	10	2					

Thomas

No. XXVII.
continued.

Thomas Dunet's half octo is
now possessed be Magnus
Scarlet, and is due for Mar-
tinmas 1711, and 1712.

Ilk penny land pays of vic-	
tual	B. 12 0 0
3 d. land	36 0 0
3 ff.	9 0 0
$\frac{1}{2}$ octo	0 3 0

6th July 1713, five pound Sterling sent with Alexander Omand,
post to Inverness.

No. VIII.

*Note of money received from the tenants of Wester Canishy, upon baillie
Alexander Clark's account, this 29th January 1715.*

			L.	s.	d.
From Peter Swany	—	—	9	4	2
nyne pd. four thill. two d.					
From Donald Iyell	—	—	9	4	2
Thomas Dunet, six octos, eleven pund					
1 thill. Scots	—	—	11	1	0
Donald Williamson, eleven pd. 1 s.	—		11	1	0
Matthew Dunet's relict. nyn pund					
iiii s. ii d.	—	—	00	4	2

(Signed) William Campbell.

George Mowat, 05 pd. 10 s. 6 d.
(signed) W. C.

No. IX.

*Account of what fowls is given in by the tenants of the west side of
Canishy for the year 1715.*

				Fowls.
Imprs. Thomas Dunet	—	—	—	9
Item, Donald Lyell	—	—	—	7
Item, Peter Swany	—	—	—	6
Item, George Mowat	—	—	—	4
Item, Matthew Dunet	—	—	—	6
Item, Donald Williamson	—	—	—	6

Account

No. XXVII. *Account of fowls received from the tenants of Canisby, 28 March 1715.*
continued.

			Fowls.
Imprs. From Janet Groat, a hen	—	—	1
Item, From Donald Williamfon	—	—	2
Item, An haulk hen	—	—	1
Item, George Mowat, a haulk hen	—	—	1
Item, Thomas Dunnet, a haulk hen	—	—	1
Item, Donald Leal, a haulk hen	—	—	1
Item, Peter Swany	—	—	1

Note of fowls received from the tenants of Canisby, 8th March 1716.

Item, George Mowat, 3 hens	—	—	—	3
Item, From Thomas Dunet, six hens, and two cocks	—	—	—	8
Item, From Donald Williamfon, four hens, three cocks	—	—	—	7
Item, From Peter Swany, three cocks, four hens	—	—	—	7
Item, From Janet Groat, three hens, one cock	—	—	—	4
				—
				29

No. X.

14th June 1716. Rental of Wester Canisby, for Martinmas and cropt 1715, being 3 d. 3 f. $\frac{1}{2}$ octo. Ilk penny land pays of money, 14 l. 14 s. 8 d. and of victual, 12 bolls.

Donald Williamfon, 6 octos.

Donald Lyell, 5 octos.

George Mowat, 3 octos — 5 10 6 p. pd. meat-lamb.

Thomas Dunet, 5 octos — 9 4 2 p. pd. meat-lamb.

William Dunnet, 1 octo — 1 16 10 p.

Peter Swany, 5 octos — 9 4 2 p. pd. meat-lamb.

Magnus Scarlet, $\frac{1}{2}$ octo.

Matthew Dunet's relict, 5 octos 9 4 2 p.

(Signed) *William Campbell.*

No. XI.

No. XXVII.
continued.

14th June 1716. Rental of *Wester Canisby*, for *Martinmas* and crop
1715, 3 d. 3 f. $\frac{1}{2}$ oetlo. *Eik penny land* pays of money, 14 l. 14 s.
8 d. and 12 bolls victual.

Janet Grott, Matthew Dunet's relict, 5 oetlos 9 4 2 pd.

Donald Williamson, 6 oetlos } paid their meat-lamb 1715 and

Donald Lyell, 5 oetlos } 1716.

George Mowat, 3 oetlos, pd. meat-lamb 1715 and

1716 — — — — — 5 10 6 pd.

Thomas Dunet, 5 oetlos, 9 4 2 and rests meat-lamb 1715
and 1716.

William Dunet, 1 oetlo 1 16 10

Peter Swany, 5 oetlos 9 4 2 and rests meat-lamb 1715
and 1716.

Magnus Scarlet, $\frac{1}{2}$ oetlo.

Minister's stipend is 5 l. 10 s. 4 d. money, and 3 3 3 $3\frac{1}{4}$ part of
a lipie.

No. XII.

Malcolm Groat posselt 1 fdm. land in Clay-pots, and rests 3
bolls victual, and a geese.

Andrew Mouat in Seater, posselt an oetlo, and rests 2 years:
As also, 3 fowls, $1\frac{1}{4}$ geese, ferme being 3 bolls, and fowls and
geese conform, and went away without asking liberty.

Pat. Swanie, Marts. debt 1717 — — — 9 4 0

William Dunet rests Marts. debt 1716 and 1617, and rests
ferme 1716.

27th November 1717.

XXVII. Received then from the tennents of Canisby of Mertinmas
continued. debt 1716,

					L.	s.	d.
Peter Swany	—	—	—	—	9	4	0
Thomas and William Dunnets			—	—	11	10	0
Donald Williamson	—		—	—	9	6	0

20th February 1718.

Dond. Williamson refts besides, 3 fowls, paid 7. Paid his geese, being $3\frac{1}{2}$, at 5 d. each.

Thomas Dunet paid his geese, being 3. He paid his fowls.

Peter Swanny paid his geese, being 3, and fowls.

George Mowat refts 6 fowls and 2 geese.

William Dunet refts $1\frac{1}{2}$ geese, and 5 fowls.

Gilb. Dunnet refts 1 geese.

XXVIII. Six receipts by Mr. Alex. Gibson, minister of Canisby, to the tennents of Canisby, for stipend, one in the 1711, one in the 1712, and four in the 1716; and receipt by Patrick Sinclair, messenger, to the said William Campbell, all contained in a wrapper, entitled, *Mr. Sinclair and Mr. Gibson's receipts*; and bearing to be, Note of fowls and geese paid out of Canisby 1715.

Follows

Follows one of the papers, whereof inspection was obtained from David Lothian the pursuer's doer, entitled on the back thus :

Note of payments of my decret against W. Canisby, 1719.

Rest of money stipend by W. Canisby.

				<i>L.</i>	<i>s.</i>	<i>d.</i>
Of Whit. and Mart. terms 1714	—	—		1	05	04
It. Whit. and Mart. terms whole 1715	—	—		5	10	04
It. whole of ann. 1716	—	—	—	5	10	04
It. whole of ann. 1717	—	—	—	5	10	04
It. of ann. 1718	—	—	—	5	10	04
It. expence of plea	—	—	—	12	15	00
				<hr/>		
				£.	36	01 8
Of this 36 <i>l.</i> 1 <i>s.</i> 8 <i>d.</i>	<i>L.</i>	<i>s.</i>	<i>d.</i>			
Paid by Tho. Dunnet	17	00	00	Charge	36	01 08
And by Geo. Mowat	7	19	04	Discharge	24	19 04
				<hr/>		
				24	19	04
				Balance	11	02 04

Rest of victual stipend.

				<i>B.</i>	<i>f.</i>	<i>p.</i>	<i>l.</i>
Imprimis, balance of crop 1714	—	—		1	1	0	3
It. of crop 1715	—	—	—	3	3	3	2 ¹ / ₄
It. of crop 1716	—	—	—	3	3	3	2 ¹ / ₄
It. of crop 1717	—	—	—	3	3	3	2 ¹ / ₄
It. crop 1718	—	—	—	3	3	3	2 ¹ / ₄
				<hr/>			
				17	0	3	0

The victual being 17 bolls and 3 pecks, was paid as follows :

By Tho. Dunnet	—	—	—	—	6	0	2	2
By Donald Williamson	—	—	—	—	5	2	0	2
By Geo. Mowatt	—	—	—	—	3	0	0	0
By Pat. Swanny	—	—	—	—	2	2	0	0
					<hr/>			
					17	0	3	0

COPY of the Defender's Proof, taken at *Thurso*,
the 31st May 1770.

C Omeared Mrs. *Barbara Frazer*, otherways *Liddle*, relict of A the deceast *Hary Liddle* Esq; some time collector of the customs at *Kirkwall*, depones, That the deponent has made search through her papers, and can find no books or letters that make any mention of any transactions 'twixt *Alexander Frazer* of *Pitcatlian*, her deceast father, and the also deceast *Alexander B Clarke*, some time Provost of *Inverness*; and that she does not know where, or in whose hands any other accompt-book of her father's may be; nor did she put away nor cancel any of them.

John Rose, sheriff-clerk of *Caithness*, depones, That the depo- C nent is posselt of the greatest part of the records of the county, which were delivered to him by the relicts of *James* and *Hugh Campbells*, some time sheriff-clerks of this county, and from *Donald Macleod*, writer in *Thurso*, who acted as depute sheriff-clerk of this county when the deponent came to it: That at the time he D received the papers from the relicts of the saids *James* and *Hugh Campbells*, he collected them from a variety of papers in the house of *Lochend*; but neither on that, or any other occasion, did he see any writs or papers relative to the intromissions of *William Campbell*, or Provost *Clarke* of *Inverness*, or any other E person, with the rents of the lands of *West Canisby* before the year 1719, excepting the letters, accompts, and jottings lately found by Mr. *James Frazer*, writer to the signet, upon a search into the papers and repositories of the said deceast *William Campbell* at *Thurso*; and also, excepting the record-copy of three bills disco- F vered by the said Mr. *James Frazer* last year, and of which the deponent gave extracts; and that, in the late search among the papers of the said deceast *William Campbell*, the principal protest of one of the said bills, viz. that drawn by *Alexander Fra- ser* on *Innes* of *Borlum*, did cast up, and is now in the depo- G nent's custody. Depones, That the deponent has had occasion to make searches for particular purposes into the papers and
G repositories

A repositories of the deceast Sir *James Sinclair* of *Mey*; but does not recollect, that he saw among them any papers respecting *Cuthbert* or *Clarke*, or the possession of the lands of *West Cannisby*, as that matter was not at all in his view when he had occasion to make the search.

B

Donald Macleod, writer in *Thurso*, depones, That the deponent was bred with *Hugh Campbell*, who was conjunct sheriff-clerk of this county with *James Campbell* of *Lochend*, his brother, both of whom were sons of the deceast *William Campbell*, also some time

C sheriff-clerk; and that the deponent likewise acted as clerk for the said *James Campbell*, after the death of his brother *Hugh*; and that, after the deceast of both *James* and *Hugh*, the deponent acted for sometime as depute to Mr. *John Gibbon*, late sheriff-clerk, and to Mr. *Rose*, the present clerk; and being chosen cu-

Q rator by the present Mr. *Campbell* of *Lochend*, a minor, and son to the said *James Campbell*, he has, in these different characters, had occasion to look through the papers of the different persons above-mentioned, and to make searches through them, and the records of the county. And depones, That he never observed or discovered a-

E mong them any other documents or instructions of the intromissions of the said deceast *William Campbell*, or any other person, with the rents of the lands of *West Cannisby*, preceeding the 1719, except the letters and accompts discovered a few days ago, at the deponent's sight, and which he has transmitted to this process, in consequence of

F the act and warrant from the Lords of session, authorising the sheriff-depute or substitute of the county to make such search, and transmit such papers as should be found, respecting the said intromissions; and that the deponent never saw any accout-book of the said deceast *William Campbell*, nor does he know or suspect,

G where, or in whose hands the same may be.

DEPOSITION

DEPOSITION of Sir John Sinclair of Mey, Bart.
 emitted by him before the Lord Ordinary,
 the 21st June 1770.

IN presence of Lord *Gardenstoun*, Ordinary, compeared Sir *John* **A**
Sinclair of Mey, Bart. a witness cited for the defender, who
 being solemnly sworn and interrogate, depones, That, since get-
 ting the citation, the deponent made a careful search amongst
 his papers, to see if he could discover amongst them any of the
 writings therein mentioned, particularly referred to in the cita- **B**
 tion, which is now produced, and marked by the deponent and
 Lord Ordinary of this date, as relative hereto. And depones,
 That he did not discover any of the writings mentioned in the
 citation, nor any others relative to the possession or intromission
 of the lands of *West Canisbay*, nor does he know or suspect where **C**
 the same may be.

N. B. In the copy of citation produced, and referred to in the
 foregoing deposition, the said Sir *John Sinclair* is particular-
 ly called upon to bring with him, exhibit, and produce any
 rentals of his estate, or accompt-books with his factors, be-
 twixt the 1696 and the 1710 or 1711, or any other docu-
 ments or instructions of any of his predecessors possession of
 the lands of *West Canisbay*, in the period above mentioned,
 and any accompts, receipts, discharges, or other writings
 in his possession, granted by *John Cuthbert of Plaids*, *Alex-*
ander Clarke Provost of *Inverness*, or *William Campbell* theriff-
 clerk of *Caithness*, as factor for one or other of the said
 persons.

Copy of the Proof ~~referred to in the preceding~~ Petition,
taken at Thurso, Dunnet, Watten, and Canisbie, the
6th, 7th, and 8th days of June 1769.

COMpeared James Sinclair of Durin, Esq; who being solemnly A
sworn, examined, and interrogated, Whether or not the de- Wit. 1.
ponent is possessed of any accounts, or other documents, which
may instruct, or tend to show, who uplifted the rents, or was in
possession of the lands, of West Canisbie, at any period preceding B
the year 1719? or if he has seen any paper or jotting whatever
relating to the said possession, or importing by whom the same was
had? depones, That he neither has, nor ever saw, any such docu-
ment, or writing, or jotting whatever; nor does he know or C
suspect where the same may be. Depones, That the deponent has
examined all the papers and account-books in his possession, and
which belonged to Sir Patrick Dunbar of Northfield, in order to
know whether they contained any thing which would tend to show D
who possessed the lands of West Canisbie preceding the year 1719;
but he found nothing to that purpose. *Causa scientie patet, &c.*

John Manson tenant in Seater, a widow, aged 70 years or there- Wit. 2.
by; who being solemnly sworn *ut antea*, depones, That the depo- E
nent was born in East Canisbie, the next adjacent town to West
Canisbie, and was a tenant there for the space of twenty years:
That since the time he left East Canisbie, he has lived in Seater, in the
neighbourhood of West Canisbie, where he has now resided twelve F
years. Depones, That he remembers, before Sir Patrick Dunbar
entered into the possession of the lands of West Canisbie. these
lands were for some time under the management of William Camp-
bell sheriff-clerk of Caithness, who lived at Thurso; that is, the G
rents of these lands were uplifted by the said William Campbell
for some years; and for some other period the rents of these lands
were uplifted by Innes of Borlum, who then lived at Gills, a con-
tiguous possession; but which of these gentlemen uplifted the rents H
for the first period, or in what right they uplifted these rents, the
deponent knows not; only he knows that these gentlemen were
not

A not considered as the proprietors of the lands ; and the deponent heard at that time, and since, that the said lands belonged to a gentleman in the south called *Cuthbert*. *Causa scientia patet, &c.* And further deposes, That none of the tenants who possessed West Canibie before Sir Patrick Dunbar entered into the possession thereof, or their children, are now living, so far as the deponent knows, &c.

WE. 3.

C John Dunnet tenant in West Canibie, aged 67 years or thereby, being solemnly sworn *ut antea*, deposes, That the deponent was born in East Canibie ; and that he has lived these thirty years past in West Canibie : That the oldest tenants the deponent remembers to have been in West Canibie, was Peter Swanny and Thomas Dunnet, who are now dead, as are also their children : That the deponent thinks he heard these men say, when he, the deponent, was young, that they paid their rents to one William Campbell who lived in Thurso, commonly called *Clark Campbell* ; but, upon E recollection, the deponent does not perfectly remember whether he heard the said Peter Swanny and Thomas Dunnet say as above deposed to, but thinks he heard so said by some person or other. *Causa scientia patet, &c.*

WE. 4.

F Mrs Margaret Sinclair in Dunnet, relict of James Murray of Clardon, aged 24 years ; who being solemnly sworn, *ut antea*, deposes, That the deponent remembers to have heard, that the lands of West Canibie, belonged to one Provost Clark of Inverness ; G but she knows not, nor has she heard, who uplifted the rents of these lands. Deposes, That she does not think, nor did she ever hear, that these lands were possessed by any of the lairds of Mey since the sale : That the deponent was acquainted with the H lairds of Mey in her time, and did not think any of them to be of a disposition to take possession of lands that did not properly belong to them. *Causa scientia patet, &c.*

WE. 5.

I Mrs Emma Clark, spouse to Sir James Taylor minister of the gospel at Watin, aged 54 years and upwards ; who being solemnly sworn, *ut antea*, deposes, That the deponent came to this country to the family of Sir Robert Dunbar of Northfield, when she was about five years old : That the said Sir Robert Dunbar was K married to the deponent's aunt : That the deponent never had occasion to hear who got possession of her father Provost Clark's books or papers after his death, or who managed his affairs ; on- ly the deponent has heard, that Sir Patrick Dunbar of Northfield took

took some concern in the management of her father's affairs. A
Causa scientiæ patet, &c.

Jean Reid, spouse to George Bruce in Gills, aged 70 years or thereby; who being solemnly sworn, *ut antea*, examined, and interrogate, depones, That she served Mr Innes of Borlum at Gills B for a part of the year 1717, and the whole of the year 1718: That she uplifted the rents of the lands of West Canisbie from the tenants thereof for Borlum's behoof one of these years; but does not remember which of them: That Borlum came to Gills at Whit-C funday 1717, and got the management of the lands of West Canisbie from his father-in-law Mr Frazer, collector of the bishops rents, that he might have the services of the tenants to work upon the farm of Gills: That the deponent heard that Clerk Campbell D uplifted the rents of the lands of West Canisbie before she came to the parish of Canisbie. Depones, That the deponent saw the man to whom the lands of West Canisbie were said to belong, in her father's house, when she, the deponent, was a child: That he was a E short thick man, and belonged to the shires of Inverness or Moray.
Causa scientiæ patet, &c.

Wit. 6.

Margaret Sutherland in Gills, relict of William Sutherland late tenant in Duncansbay, aged 78 years or thereby; who being solemnly sworn *ut antea*, examined, and interrogate, depones, That the deponent lived at the kirk of Canisbie in her early days; and that she heard that the tenants of West Canisbie paid their rents to Clerk Campbell at some period preceding the year 1719. *Causa G scientiæ patet, &c.*

Wit. 7.

George Mowat tenant in West Canisbie, married, aged 50 years, admitted by both parties without objection, though not cited, being solemnly sworn *ut antea*, depones, That he the deponent has lived H in West Canisbie for these twenty-two years past: That he had an uncle called George Mowat, who lived in West Canisbie, with whom, and with some other old tenants who lived there, the deponent has conversed: That he has heard these tenants say, that they I paid their rents to Clerk Campbell in Thurso, before Sir Patrick Dunbar got possession of the lands of West Canisbie; and that he has heard them say, Mr Campbell uplifted these rents, in consequence of powers from one Mr Clark of Inverness. *Causa scientiæ K. patet, &c.*

Wit. 8.

Copies

Copies of the protested bills found on record in the sheriff-court books of Caithness.

- A William Dunnett, Gills, July 7. 1718, Against the 1st day of August next, pay to me John Innes of Borlum, or my order, in my dwelling-house of Gills, and the harbour thereof, seven pounds ten shillings Scots money, with four bolls and two firlots bear, B sufficient girnel-stuff; and that as the money and victual rent, and the peat-money, due out of your occupation in West Canisbie, under the failzie of eight merks Scots for each undelivered boll. Make thankful payment, and oblige your humble servant, (Sic C subscriber) *John Innes.* (Directed) *To William Dunnet farmer in West Canisbie.* Accepts (sic subscriber) *William Dunnett.*

- Donald Williamson, Gills, July 7. 1718, Against the 1st day of August next to come, pay to me John Innes of Borlum, or my D order, at my house of Gills, and harbour thereof, seventeen pounds Scots money, with five bolls bear, good and sufficient gi nel-stuff, being the money and victual rents due by you out of your occupa- E tion in West Canisbie, with the peats, for crop 1717 years, under the failzie of eight merks Scots for each undelivered boll. Make thankful payment, and oblige your humble servant, (Sic F subscriber) *John Innes.* (Directed) *For Donald Williamson farmer in West Canisbie. With the first two letters of my name, as my ordinary mark, since I cannot write at length, before these witnesses,* John Innes farmer in Gills, and James Bruce farmer there. Accepts (Sic subscriber) *D. W. John Innes witness. James Bruce witness.*

The above bills protested the 8th August 1719, and registrate in C the sheriff-court books of Caithness the 8th September thereafter.

- Sir, Thurf, 12th May 1719, At fourteen days sight, pay to me Alexander Frazer collector of the bishops rents of Caithness, or H order, at my house in Scrabster, the sum of two hundred and sixteen pounds fourteen shillings and ten pennies Scots money, value in your hands of me, as the rents of Wester Canisbie, belonging to Provost Clark, for which you are an intromission, by I my order, and granted bill to Provost Clark, at Martinmas last, for the foresaid sum. For which you'll make thankful dayment, and oblige, Sir, your humble servant, (Sic K subscriber) *Alex. Fraser.* (Directed) *To John Innes of Borlum.* (Accepted thus) Accepts (sic subscriber) *John Innes.*

Protested the 5th August 1719, and registrate in the sheriff-court books of Caithness the same day.

JULY 31, 1770.

[Lord GARDENSTON reporter.]

INFORMATION

F O R

Mrs. Elizabeth Dunbar, lawful daughter, and universal dispoinee of the deceased Sir Patrick Dunbar of Northfield, baronet; and James Sinclair of Duran, Esquire, her husband, for his interest, pursuers and respondents,

A G A I N S T

Alexander Cuthbert, Esquire, defender and petitioner.

IN this cause, which has been often before the court, Lord Gardenston, ordinary, has made avifandum to the Lords, and appointed both parties to put in informations on the import of a proof reported to his Lordship, touching the intromissions of the deceased Robert Innes of Mondole, and Alexander Clark, provost of Inverness, with the rents of a small parcel of lands, called the lands of West Cannisby, prior to the year 1719.

The facts necessary to introduce your Lordships to the point taken to report, are already stated in a reclaiming petition for the said Alexander Cuthbert, and answers thereto for the pursuers, intended to be *simul et semel* advised with these informations: it would therefore be improper to trouble your Lordships, with resuming them at length.

Suffice it to say, that Innes and Clark having made large advances for the deceased John Cuthbert of Plaids, he, for their security and relief of these, and other advances made, and to be made by them on his account, disposed, and made over to them his right, imo, to the lands of West Cannisby, which had been adjudged by decret of your Lordships in 1694, pronounced in a process of ranking and sale of the creditors, and estate of Sinclair of Mey, to *those having right* to two apprisings affecting that estate, originally deduced in 1664, which came by progress into

A

the

the person of Plaids. 2do, To the sum of 1070 l. 12 s. 4 d. Scots, thereby decerned also to be paid to them by William Innes, writer to the signet, who purchased part of that estate at the judicial sale, for behoof of Sinclair of Ulbster. And, 3do, to the sums of 5154 l. 15 s. 10 d. and 331 l. 9 s. 10 d. both Scots, with interest from Whitsunday 1694, decreed to be paid by the Earl of Cromarty, who purchased another part of the said estate.

The pursuers are now in the right of Innes and Clark, and, by final judgments, both of your Lordships and of the Lord ordinary, it has been found, that they have the prior and preferable right to the said debts, decerned to be paid by the Earl of Cromarty, and that the defender is bound and obliged to denude in their favour, in so far as Innes and Clark were creditors to Cuthbert of Plaids.

The extent of the debts due by Plaids to Innes and Clerk, is also ascertained long ago by repeated and final interlocutors in this process; and it appears from clear and unexceptionable vouchers produced, to amount to 2000 l. sterling, or thereby.

The defender has endeavoured to cut down the said claim by certain intermissions, which he pretends the pursuers or their authors had with Plaids's means and effects.

And the present question is, from what period are the pursuers accountable or chargeable with the rents of the lands of West Canisby, amounting to 15 l. of yearly free rent, or thereby? whether from the 1712, the time at which Sir Patrick Dunbar entered on possession, or from the 1710, the date of the conveyances by Plaids to Innes and Clark? or from the 1694, the date of the decret in the ranking and sale?

The pursuers must, in the entry, observe, that as Innes and Clark had a right in *security* and relief, which did not oblige them to enter into possession; and as by the dispositions conceived in their favour, they were expressly declared to be liable for their *actual intrusions only*; so the point stands finally adjudged by many repeated interlocutors, both of your Lordships and of the Lord ordinary, particularly by the Lord ordinary's interlocutor of the 14th July 1768, recited page 8th of the defender's reclaiming petition.

Against these interlocutors, the defender presented a reclaiming petition, in which every circumstance or *presumptive* argument, which ingenuity could suggest, was stated; and he prayed your Lordships,

Lordships, *inter alia*, "to find that the pursuers must account for the rents of the lands of Cannisby from 1694, or, at least, from 1710." But your Lordships, on advising the petition, with answers, refused the petition, and adhered by interlocutor of the 25th January 1769.

The pursuers therefore must hold that they are chargeable and accountable for *actual intromissions alone*, proved by positive and pointed evidence, and that no intromissions or charge can be made or fixed upon them by *presumptions*.

On this fixed principle; after the said interlocutors, which became final, were pronounced, the cause returned to the Lord ordinary, and the defender offered and insisted to be allowed to *bring a proof*, that Innes and Clark had possessed and intromitted with the rents of the lands of Cannisby from 1694.

In this view he exhibited a condescendence, on which a proof was granted, and being reported, the Lord ordinary pronounced several interlocutors, finding, "That the defender had not brought any *sufficient evidence* to prove or instruct, that Innes and Clark had possession of the Lands of West Cannisby, prior to the disposition in favour of Sir Patrick Dunbar in 1719."

These last interlocutors the defender brought before your Lordships, in a reclaiming petition, which, upon answers, was, of this date, refused by interlocutor recited page 1st of the defender's re-^{Feb. 15,} claiming petition. Your Lordships at same time remitted to the 1770. Lord ordinary to grant warrant for inspecting the account-books and papers of the deceased William Campbell, late sheriff-clerk of Caithness, and a diligence for recovering the account-books and other writings of one Alexander Frazer deceased; and as the defender insisted for exhibition of certain papers in the hands of David Lothian, the pursuer's agent, it was further remitted to his Lordship to *do therein as he should see cause*, as well as to hear parties upon what further the defender condescends upon, and offers to prove relative to the intromissions of Innes and Clark, with the foresaid rents prior to the 1719.

Before the defender had applied for exhibition of the papers in Mr. Lothian's hands, he had already got Mr. Lothian examined upon oath, and Mr. Lothian had deponed that he was not possessed of any papers which could instruct the possession or intromission of Innes and Clerk with the rents of West Cannisby prior to the 1719. The demand, therefore, that he should exhibit the papers

pers themselves, after having deponed to their contents, appeared plainly intended for delay. However, the pursuers, rather than litigate any unnecessary point, agreed that Mr. Lothian should exhibit the papers, which he did accordingly; and it appeared on inspection, that they did *not in the least* tend to instruct any intromission made by Innes and Clark.

The defender was also allowed warrant and diligence for inspection and recovering of Clerk Campbell's papers, and those of Alexander Frazer; the papers were accordingly inspected, and some scraps have been recovered. Several witnesses were also examined, and the proof, both written and parole, being reported, the Lord ordinary, after memorials were lodged, directed informations to be put in on the import of it. This therefore is humbly offered on the part of the pursuers.

In the memorial exhibited to his Lordship on the part of the defender, a great deal of *general argument* was re-introduced, in which it was endeavoured to be shewn upon *presumptions*, that Innes and Clark had intromitted with the rents prior to 1719; but as every one of those Arguments has been again and again repeated by the defender, and obviated by the pursuers, as well as repelled by your Lordships, particularly in the petition and answers, on which your Lordships pronounced the interlocutor of the 25th January 1762, adhering to the Lord ordinary's of the 14th July 1768, and again, in the other petition and answers, on which your Lordships pronounced the interlocutor of the 15th February 1770, it is sufficient for the pursuers at present to say, that they can have no weight, not only on account of the express terms of the rights granted to Innes and Clark, by which they are declared to be liable for *actual intromissions only*, but also of the final interlocutors above mentioned, pronounced both by your Lordships and by the Lord ordinary on this point.

The pursuers, therefore, cannot help reckoning it extremely hard upon them, as it must be distressful to your Lordships, that the defender, by returning to these presumptive arguments, in his memorial, shews, he intends again to repeat them in his information, and makes it at all necessary to take notice of them, before proceeding to consider the proof, which stands reported.

For instance, it was said, that Sir Patrick Dunbar got possession of *all* the papers, both of Cuthbert of Plaids, and of Innes and Clark. But the alledgeance is a *gratis dictum* of the defender; no evidence

evidence is given of it, and the contrary is the fact ; Sir Patrick had occasion for no other writings than the apprisings, and those which concerned and were necessary for vouching and supporting the right to the particular subjects specially disposed to Clark and Innes. The insinuation, therefore, was injurious, which was made by the defender, as if the pursuer, Mr. Sinclair, who was examined upon oath, had withheld papers that could serve to instruct the possession of Innes and Clark : His circumstances, not to mention his character, put him above all suspicion ; and it is not obvious how Innes or Clark could be possessed of writings which could instruct their supposed possession.

Again, an argument was endeavoured to be raised in this manner, and it was pleaded, that the lands must have been possessed either by Cuthbert of Plaids, or by the family of Mey, or by the tenants of the estate, or by Innes and Clark ; and as it was laboured to be shown, that they had not been possessed either by Plaids, or by the family of Mey, and that the rents could not remain unpaid in the hands of the tenants, it was thence inferred, that Innes and Clark most probably intromitted with them.

The argument, however, being artificial merely, and altogether inconclusive, was formerly disregarded and over-ruled by your Lordships. The respondents, therefore, will not repeat the answers already made to it, as the argument itself is directly flying in the face of the principle fixed both by the terms of the rights, and by your Lordships interlocutors.

The pursuers cannot say who possessed the lands, and they are not bound either to know or to enquire into it : They shall only observe, that it is not improbable, that Plaids himself, or Castlehill, who acted for him during his minority, recovered the rents, at least those which had become due prior to the 1710, as he was *in titulo* to uplift them ; and it does not appear, by the least evidence, that any rents were then resting by the tenants. On the contrary, they were not only mostly prescribed by that time, but it would even appear from a letter, dated 30th October 1715, written by one Mouat, that they had been all paid before 1710, which could not be to Innes and Clark, as they were not *in titulo* at the time, but it must be presumed was either to Plaids, or to some other person. Perhaps too, some of them have been allowed to perish, which is not improbable either, considering the circumstances of the estate, the rather that George Mouat depones, he

heard some of the tenants say, they did not pay any rent for several years.

The argument, therefore, brought by the defender, that in a factory granted by Plaids in 1709, power was given to Innes and Clark to recover the bygone rents, besides being really contradicted by the fact, is inconclusive in itself: For, 1mo, The factory does not relate to the present lands; these are the lands of *West Canilby*, whereas the lands mentioned in the factory are those of *East Canilby*. 2do, The factory is totally general, empowering Innes and Clark to recover *all* debts, sums of money, and others whatsoever due to Plaids, particularly mentions the present debt on Cromarty, 6000 merks pretended to have been due by a bond of provision, said to have been granted by Lord Duffus, and the funds that were afterwards made over by the dispositions granted in favour of Innes and Clark in 1710, which is demonstration that no intromission can be fixed upon them by that factory, because, if it were available to make them chargeable for the rents of *West Canilby* (which, by the bye, are not mentioned in it) it would, on the same medium, render them accountable for the present debt, still outstanding against the forfeited estate of Cromarty, of which it is not pretended a farthing has ever been recovered. Indeed, it was never heard, that a factory was evidence of any intromissions against the factor; these must be proved *aliunde*.

An argument too, was founded on that which was called the rapidity discovered by Innes and Clark, in laying hold of every subject they could belonging to Guthbert of Plaids.

Here it is remarkable, that the defender contradicts himself. The note founded in the former papers was, that Innes and Clark neglected the affairs of Plaids, and did not take a step for recovering the subjects, or executing the trust committed to them. But now a different note suits better: It does not, however, infer or lead to any just conclusion. The only fund which the trustees recovered that belonged to Plaids, was 1071 l. decerned to be paid by William Innes; the present process surely is full evidence that they did not recover the debt due by the Earl of Cromarty; and if they were not able to make effectual this money, for which they were possessed of a final decreet of this court, decerning it to be paid by his Lordship, it is altogether improbable that they either would or could obtain possession of a small farm like *West Canilby*, situated at a distance from their abodes, and evicted from

a potent family, still resident in that remote country, far from the seat of justice, and unused to render obedience to it.

It appears from the decret of division 1696, that the family of Mey continued to keep possession of the estate, and resisted the purchasers on their attempting to enter upon it; nay, they would not even allow the creditors, but opposed them, in endeavouring to prove the rental, and the way in which even this court in those days was contented with allowing it to be proved, was by *holding them confessed* on a rental given in for that purpose; it cannot, therefore, be supposed that Innes and Clark, who were aliens in Caithness, could attain possession; and if it be true, as the defender alledged, that the family of Mey were supported by and in concert with the Earl of Cromarty's other creditors, it is extremely probable that they would not be early disturbed or easily ejected; but Sir Patrick Dunbar, a man of influence, possessed of a considerable estate in the county, and its representative in parliament, would find it a more easy matter to make his right effectual, than any others could possibly do.

The defender made a few other observations, which the pursuers confess they are at a loss to understand; and it was particularly said that every thing ought to be presumed against parties who have denied or misrepresented facts which appeared afterwards to be true.

But if your Lordships should think yourselves authorised to proceed upon that principle in the present case, the defender surely would be little benefited by it. Not to mention his extraordinary demand, that the pursuers should be charged with the rents and value of certain houses in Inverness, (which are at present part of the defender's *own* estate) and that action should be denied to the pursuers till they produced a particular inventory, (which was demonstrated to have been delivered to the defender's author himself, and was actually produced by the defender) and also that they should be made accountable for a parcel of old lumber of papers, confessedly useless, to which the defender pretended no title, and which had not been conveyed to Innes and Clark; your Lordships and the Lord ordinary will well remember the long and obstinate litigation maintained by the defender, that the pursuers should likewise be charged with the principal sum of 6000 merks, with 40 or 50 years bygone interest, alledged to be contained in a bond granted by Lord Duffus, or his brother Mr. James Sutherland, advocate,

advocate, to Plaids's wife for that sum, notwithstanding that he knew no such bond had been assigned or delivered to Innes or Clark, and that the bond he intended, stood upon record in this court, had been granted in 1717, many years *after* the conveyances made to Innes and Clark, and was produced in the ranking of the creditors upon the estate of Skelbo, as the interest of the proper creditors having right thereto.

All these particulars were fully explained in the former papers, and after an obstinate litigation, the defender was obliged to abandon, or was over-ruled in every one of the demands, after which, it was hardly to have been expected, he would have pleaded that every thing ought to be presumed against parties who deny and misrepresent facts.

The pursuers have not, from first to last, concealed or misrepresented a single fact or particle of intromission, of which they had occasion to be informed;—they were singular successors, and could not know the intromissions of their authors, or be personally acquainted with transactions, which happened mostly before they were born;—they had the candour, however, to acknowledge, at the very beginning of the cause in winter 1764. because they believed it to be true, that Sir Patrick Dunbar possessed, and acquired right in 1719 to the lands of West Cannisby, of which the free rent amounted to 300 merks a-year, or thereby. This was a full, and the only condescendence which they *could* exhibit, consistently with *truth*; they *could not* condescend on, or charge themselves with, or give credit for intromissions, of which they had never heard, and they had had no occasion to know, that the 1071 l. had been recovered by Innes and Clark from William Innes, but the moment this appeared to be the fact, they admitted, that that sum should be charged against them.

These general observations being premised, the pursuers shall proceed to the new proof lately reported.

This proof consists, 1mo, of certain unsigned scraps and jottings of accounts, on detached and lacerated bits of paper produced. 2do. Of some letters written by provost Clark to clerk Campbell, of which the defender is appointed to print full copies, for your Lordships perusal.

And the precise question will immediately occur to be, “Whether your Lordships have sufficient or legal evidence of any intromissions, prior to the 1719, and what these are?” or, which
comes

comes to the same thing, " Whether, in an action for payment of these intromissions, in the way of debt or account, at the instance of Cuthbert of Plaids, against Innes and Clark, he could, upon *this* evidence, have prevailed, and obtained *decreet* against them for any intromissions, as it is impossible that a fraction can be stated in the way of *charge* or *compensation*, for which *action* could not have been maintained at Plaid's instance against them."

On considering the proof in this manner, it is clear, there is not a grue of evidence, that Innes and Clark, either uplifted, or had intromission with a farthing prior to the 1710; all the scraps and letters, such as they are, point plainly the other way, and further relate to posterior periods.

And, with respect to the period after 1710, it will not escape observation, upon the first part of the proof, that these scraps and jottings are all *unsigned*, and they are not pretended to be holograph, either of Clark or of Innes; the purpose for or occasion on which they were written, does not appear, whether it was for amusement, or in any other view; and they are altogether detached and unconnected, *ex facie*, imperfect and incomplete; it is therefore impossible *they* can establish, or afford evidence of any intromission against either Innes or Clark: That can only be done by proper evidence produced under their own hands.

Hence the letters are the only writings now reported, which merit attention, but they also, on your Lordships considering them, will appear altogether vague and insufficient, and the earliest of them being dated in 1711, and the latest in 1714, they can in no view prove intromissions, prior or posterior to that period.

1mo, The first, dated 3d April 1711, the second, dated 7th May 1711, and the third, dated 10th September 1711, do not even mention the lands of Canisby.

2do, The only ones, which mention them, are the fourth, dated 8th April 1712, the fifth, dated 26th May 1712, the seventh, dated 18th August 1712, the 8th, dated 8th June 1713, the tenth, dated 28th July 1713, the eleventh, dated 24th February 1714, and the twelfth, dated 19th October 1714.

3tio, Those, in which the lands are mentioned, do not show that any particular sums were received by, or payments made to, Clark.

4to, The only letters, in which any particular quantities are specified, are the fourth, ninth, tenth, and twelfth.

5to, The defender alledged that Clark appeared, from these letters, to have been enquiring about the lands; but the consequence is not obvious: That was most natural for him to do, as the lands had been disposed to him for his relief; but it makes against the defender, for this circumstance, as well as the strain of the letters shows, that Clark was only *beginning* his enquiries in 1711, and that he had had no intromission, either through Campbell, or otherwise, before that time. And if any presumption arises from the letters, it is, that any victual or money received out of the lands of Cannisby, was all applied to the use of Cuthbert of Plaids. Plaids's necessities appear from evidence in process, and it is proved that Innes and Clark made large and generous advances to him; therefore, it is probable that he was allowed, for his subsistence, to receive any small pittance of rents, which could be recovered out of the lands of Cannisby; and this would appear even from one of the letters produced, dated the 24th February 1714, in the following terms: "*Being to state accounts shortly with John Cuthbert,*" "you'll send me a particular account of the payments you have made me of the rents of Cannisby, and a particular account of the payments made you by the tenants. *If there is any money in the hands of the tenants, or your own, of the last year's crop, and proceedings, pray send it.*" This letter would point out, that an account of the rents was to be rendered to Plaids, that Plaids himself was the person who possessed the lands, and that any intromissions, which either Campbell or Clark can be pretended to have had, were applied for his behoof.

The same thing would also appear from a messenger's receipt, dated 10th October 1716, for executing a summons, in the name of Cuthbert of Plaids, against the old Laird of Mey; which the defender said was more than probably for repetition of the tiends uplifted by Mey: This shows that Plaids was the party really in possession of the lands, understood to have a right to insist for repetition from all who had intromitted with the rents or fruits, and exercising that right at the time.

It is indeed said, in one of the letters, that Clark was to send a factory to Campbell; but it does not appear that such factory was ever granted; and the original title on which Campbell came at all to interfere, is unknown; but it is clear, from the strain of the letters

letters, that he had had no interference before the 1711, for that he began then only to interfere: And the presumption is, that he was employed to uplift the rents, for the behoof of Plaids, with the consent of Clark, after the dispositions were made in favour of him and Innes.

The only other observation, with which the pursuer shall trouble your Lordships, is, that the whole sums specified in all the letters produced, viz. 80 l. and 66 l. and 48 l. and 55 l. 5 s. Scots, on being added together, amount precisely, and to no more, than the sum of 249 l. 5 s. Scots; which therefore is the utmost additional charge that, in any view, could possibly be made upon the pursuers, in consequence of the suppletory proof, as it is not instructed, that a farthing more came at all into Clark's hands: The defender will not surely now pretend, they can be chargeable for more than the particular articles, mentioned or stated in the writings; and it is remarkable, that this sum corresponds exactly to the first article of the credit-side of an unsigned account of charge and discharge produced, betwixt Campbell and Clark, respecting the rents of Cannisby for four years, from Martinmas 1712, to Martinmas 1716, in which account, credit is given for cash therein said to be paid to Provost Clark, as per his several letters acknowledging the same.

In respect whereof, &c.

GEO. WALLACE.

201002000000

UNTO THE RIGHT HONOURABLE,
THE LORDS OF COUNCIL AND SESSION,

T H E
P E T I T I O N
O F

Mrs. *Elizabeth Dunbar*, lawful Daughter and universal Disponee of the deceased Sir *Patrick Dunbar* of *Northfield*, and *James Sinclair* of *Duran*, Esquire, her Husband, for his Interest;

HUMBLY SHEWETH,

THAT *John Cuthbert* of *Plaids*, in the 1709 and 1710, conveyed, by two several dispositions in favours of *Alexander Clark*, bailie of *Inverness*, and *Robert Innes* of *Mondole*, two apprisings, affecting the estate of *Mey*, which was purchased by *George* first Earl of *Cromarty*; and, in virtue of which, by the decreet of division of the price of that estate, the apprisers were to draw 5154 *l.* 15 *s.* 10 *d.* and 331 *l.* 9 *s.* 10 *d.* both *Scotch*, with interest, from *Whitsunday* 1694; as also, the lands of *West Camusby*.

These conveyances were, *ex facie*, absolute and irredeemable; but by back-bonds, of even date with the dispositions, it was provided and declared, that out of the first and readiest of the money arising from these funds, they should retain in their hands, "as much as would satisfy and pay all debts due by *Plaids* and "his predecessors, which they either satisfied and cleared, or should

"should thereafter satisfy and clear, with all sums which they either had advanced, or should advance to *Plaids* himself."

Innes and *Clark*, trusting to the security thereby granted, expended large sums in clearing *Plaids*'s debts, and extricating his affairs, which were then very much involved.

The right which *Innes* and *Clark* had in the foresaid subjects, became fully vested in the person of Sir *Patrick Dunbar*, about the 1720.

John Cuthbert of *Castlehill*, obtained an assignation in the 1713, to the back-bonds above-mentioned, granted to him by *Innes* and *Clark*: And he having, by his settlement, conveyed the same to *Jean Hay*, his wife; and Sir *Patrick Dunbar*, who had clearly a preferable interest in the subjects, being a very old man, and living in the remote county of *Cuthberts*, having neglected, within the time limited by the vesting act, to enter a claim for the foresaid debts, upon the forfeited estate of *Cornarty*; a claim was entered by the Lady *Castlehill*, as having right from her husband, to the back-bonds granted by *Plaids* to *Innes* and *Clark*.

The grounds necessary for supporting her claim, were recovered by her, on a diligence, out of the hands of Sir *Patrick Dunbar*. Sir *Patrick*, with his doer, when cited upon this diligence, did assert his right before the late Lord *Woodhall*, who, by his interlocutor, expressly reserved to Sir *Patrick*, notwithstanding his producing the writs called for, "all right and title which he had to the subject then claimed by Lady *Castlehill*."

Lady *Castlehill* acquiesced in this interlocutor, and proceeded to get her claim intimated; and Sir *Patrick* was only prevented by death, from commencing an action, which, he was advised, it was proper for him to bring, for having it found and declared, by decree of this court, that he had, upon the titles aforesaid, a prior and preferable right to the money, with the best and only title to uplift, receive, and discharge the same.

That action, which he was prevented from instituting, the petitioners, as in his right, brought in 1743 and the same came in course before the Lord *Gardens* Ordinary.

It is unnecessary for the present purpose, minutely to resume the different steps of procedure in this action. A most obstinate litigation did ensue upon the part of the defender, and every possible device was fallen upon to protract and delay the cause.

The

The Lord Ordinary, upon advising a representation for the petitioners, and answers for the defender, of this date, pronounced the following interlocutor: "Adheres to the former interlocutor, in so far as it finds, that the defender, in virtue of her title founded upon, and particularly, in virtue of the decreets sustaining her claim, is vested in the right and property of the debt upon the forfeited estate of *Cromarty*; but varies the subsequent part of the interlocutor, and finds, that the conveyance of this debt, granted by *Plaids*, was only a right in security for the sums truly advanced, or to be advanced by *Innes* and *Clark*, for *Plaids*'s behoof, and was a trust as to the residue or reversion, which right *Innes* and *Clark* could not transfer to Sir *Patrick Dunbar*: Finds, that the pursuer is intitled to insist, *that the defender shall denude in her favour, in so far as the said pursuer shall instruct, Innes and Clark were creditors to Plaids.*"

Feb. 11.
1766.

The defender presented a reclaiming petition against the foresaid interlocutor; in which, she prayed your Lordships to find, that she had the preferable right to the debts in question, affecting the forfeited estate of *Cromarty*; and that the pursuer, having neglected to enter her claim within the time prescribed by act of parliament, had lost all right or claim whatever to the foresaid debts.

The now petitioners, on the other hand, being advised, that their right being prior and preferable to that of the defender, intitled them to an immediate decret, preferring them to the money; and, foreseeing the consequences they have since felt, of entering into any unnecessary litigation with the defender, preferred a petition upon their part; in which they offer to find the best caution, to account for any overplus that might be found due out of that fund, after clearing the debt due to them; and, in respect of that offer, prayed your Lordships, to decern and declare against the defender, that they had the prior and preferable titles to the foresaid money or debt, found due out of the forfeited estate of *Cromarty*, as well as the only and undoubted right to uplift and discharge the same; and accordingly, to decern the defender to denude herself of, and assign the decree, sustaining the claim in her favour upon the said forfeited estate.

Your Lordships, on advising these petitions, with answers, refused both, and adhered to the Lord Ordinary's interlocutors, Nov. 26. with this variation, "That the defender, Mrs. *Jean Hay*, shall 1766.
" be

" be obliged, before she draw the money in question, to find
" sufficient caution for paying back, and repeating the same to
" the pursuer and her husband, or what part thereof they shall
" be found intitled to in the event of this process; and remit to
" the Lord Ordinary to proceed accordingly."

The cause having returned to the Lord Ordinary, a compt and reckoning ensued. and a remit was made to an accomptant to make up a state of the accompts, and to report his opinion upon the objections and answers thereto.

The defender, however, would not acquiesce in this step. however proper, and even harmless to him, but preferred several representations, one after another, on most frivolous grounds, which were all refused; and the report having been made by the accomptant, was, of this date, approved by the Lord Ordinary.

June 19.
1768.

From this report it appears, that the petitioner's authors, *Innes* and *Clark*, advanced and paid to, and on account of *Plaids*, sums, which, at this day, amount, of principal and interest, to upwards of 2000 *l. Sterling*; and the advances made by them, were so clearly proved by vouchers produced, that even the defender herself could not contest a single article of them; so that the dispute turned entirely upon the articles with which *Innes* and *Clark*, and the petitioners in their right, fell to be charged.

The defender insisted, that the petitioners fell to be charged with various particulars, all of which have been finally settled against the defender, except one article still in dependence, respecting the rents of the lands of *West Canisby*, with which, it was insisted, the petitioner's authors fell to be charged from the

July 14.
1768.

1604. And the Lord Ordinary, by his interlocutor of this date, " found, That the pursuer is only obliged to account for the rents
" of the lands of *West Canisby*, from *Whitsunday* 1719, in respect
" the defender offers no proof of an earlier possession by *Innes*
" and *Clark*, the original trustees, and shows no sufficient cause
" for resting on bare presumptions of an earlier possession." And this interlocutor was adhered to by your Lordships, upon advising petition and answers.

The defender, thereafter, was allowed a proof, for instructing *Innes* and *Clark's* possession, prior to *Whitsunday* 1719: But the Lord Ordinary, upon advising, " Found, that he had not brought
" sufficient evidence to instruct an earlier possession."

The

The defender hereupon preferred a representation, praying an alteration of the interlocutor; at least, that warrant should be granted, for inspecting the papers of the deceased *William Campbell*, sheriff-clerk of *Caithness*, for instructing further intromissions against *Innes* and *Clark*: But this representation was, upon answers, refused.

The defender reclaimed against the foresaid interlocutor; and your Lordships, upon advising the petition and answers, of this date, pronounced the following interlocutor: “ Finds, that there Feb. 15, 1770.
 “ is no sufficient evidence brought to prove, or instruct, that
 “ *Innes* and *Clark* had possession of the lands of *West Canisby*, prior
 “ to the disposition in favours of Sir *Patrick Dunbar*, 1719; and
 “ adhere to the Lord Ordinary’s interlocutor as to that point; but
 “ remit to the Lord Ordinary, to grant warrant for searching the
 “ accompt-books and papers of the deceased *William Campbell*, late
 “ sheriff clerk of *Caithness*; and to transmit to this process, what
 “ writings shall be found relative to clerk *Campbell*’s intromissions
 “ with the rents of *Canisby*, prior to the year 1719; and to grant
 “ diligence for recovering the accompt-books and other writings
 “ of the deceased *Alexander Fraser*, relative to his alledged intro-
 “ missions with the rents of the said lands of *Canisby*, prior to
 “ the said period; and also, to hear parties procurators upon
 “ what further the petitioner condescends upon, and offers to
 “ prove, relative to the intromissions of *Innes* and *Clark* with the
 “ foresaid rents, and by whom he is to prove the same; and, as
 “ to the third prayer of the petition, respecting the inspection of
 “ the papers called for from *David Lothian*, remit to the Lord
 “ Ordinary to do therein, as he shall see cause: Find, that the
 “ 153 *l. Scots* bill said to have been paid to *John Colly*, cannot be
 “ taken into the accomptant’s report, as there is no evidence in
 “ process of its existence; and remit to the Lord Ordinary to pro-
 “ ceed accordingly.”

The defender reclaimed against the foresaid interlocutor, and also against another interlocutor of your Lordships, finding, that the Lord Ordinary had no power, *in hoc statu*, to authorise the sale of the lands of *West Canisby*: And, in this petition, they prayed your Lordships to ordain the lands of *West Canisby* to be exposed to public roup, according to articles to be adjusted at the sight of the Lord Ordinary; or, at least, to find, that the pursuer cannot insist in this process, whilst the refuses to concur, or consent

to the sale of the lands of *Canisby*. 2do. To supersede determining the question, from what period the pursuer is to be accountable for the rents of the lands of *Canisby*, till after the papers of clerk *Campbell* have been inspected, and Mr. *Lothian* has exhibited the papers in his hands, called for by the petitioner, and to ordain this inspection and exhibition to be made, and the farther proof allowed to be reported, before answer: "At any rate, to find, that the petitioner has already brought sufficient evidence of *Innes* and *Clark's* intromissions with the rents of *Canisby*, for the crop and year 1717, and downwards."

March 2. 1770. *Ec.* "This petition your Lordships ordained to be seen and answered, "But without prejudice to the Lord Ordinary, to proceed in the exhibition and proof, at calling the cause, any time this session."

Answers have accordingly been put in to the petition: The proof demanded has been granted, and reported; with which the Lord Ordinary has made *avifandum* to your Lordships, and appointed parties to give in memorials; which memorials have accordingly been prepared, printed, and put into the boxes; so that the whole cause is now ready to be advised.

That a petition was preferred to your Lordships, upon the part of the defender, *Alexander Cuthbert*, setting forth, that the decret sustaining the claim of Mrs. *Jean Hay*, the defender's mother, on the estate of *Cromarty*, with the conveyance thereof, in favours of the petitioner, had been lodged with the proper officer in exchequer, in order that a precept might be issued at the same time with the other creditors, on that estate, before the rising of the term, upon the petitioner's finding caution in terms of your Lordships interlocutors, as the money was daily expected to come down, and the Barons had resolved, that it should bear no interest from the 5th of *July* last: That the defender, who resides in a foreign country, had, sometime ago, wrote to his doer, that he was to be here himself, sometime in the month of *July*, and would then find the caution required; and for that reason, he had not transmitted a bond of caution, signed by himself, in order to be afterwards signed by the cautioners: That although the defender had not yet arrived, bonds of caution for him had been offered to your Lordships clerks, by gentlemen residing in *Edinburgh*, of undoubted credit, with whose security the clerks were satisfied; but that they declined to receive the caution, in respect of the de-
fender's

fender's not being bound and subscribing the bond as principal. And therefore, praying your Lordships, to authorise the clerks of session, to receive sufficient caution acted in your Lordships books, in terms of the above recited interlocutors, without the necessity of the defender's signing as principal.

Upon hearing this petition, your Lordships pronounced the following interlocutor: "The Lords having heard this petition, ^{Aug. 2.}
 " they remit the same to Lord *Gardenstoun* Ordinary, with power ^{1770.}
 " to his Lordship to call and hear parties procurators thereon,
 " and to do therein as he shall see cause; and also, with power
 " to him to call it at any time this session."

At a calling of the cause before the Lord Ordinary, a letter or mandate from the defender was produced; whereupon, his Lordship pronounced the following interlocutor: "Finds, that the letter produced, is a sufficient mandate for giving in the present petition,
 " and makes *avisandum* to the Lords with the other points in the
 " petition."—And thereafter, of this date, your Lordships ^{Aug. 2.}
 " pronounced the following interlocutor: "On report of Lord *Gar-* ^{1770.}
 " *denstoun*, and having resumed the consideration of this petition,
 " the Lords grant warrant to, and authorise the clerks of session,
 " to receive a bond from sufficient persons, binding themselves
 " as conjunct principals, to the effect mentioned in the former
 " interlocutors, which, they declare, shall be held as full implement
 " of the obligation upon the petitioner by the former interlocutor."

As the defender will, in consequence of the caution so found, draw the whole debt upon the estate of *Cromarty*, and the petitioners will be left to recover their payment from the defender the best way they can, the petitioners have made this application to your Lordships, in order that they may be found intitled to draw out of the money to be divided among the creditors, to the extent of the balance that is already ascertained to be clearly due to the petitioners, and that preferably to the defender, reserving to the defender what sums shall remain over and above said balance: And when the circumstances of this case are considered, the petitioners do humbly hope, your Lordships will be of opinion, that they are well founded in such demand.

Your Lordships will observe, from the above state of the case, that the the petitioners authors, *Innes* and *Clark*, had a conveyance to the debts in question, affecting the estate of *Cromarty*; which

which conveyance was, *ex facie*, absolute and irredeemable, but was qualified by back-bonds, by which they were to account to *Plaids* for their intromissions, *after reimbursing themselves of whatever sums Plaids should stand indebted to them*; and as the defender's claim to the money in question, is founded entirely upon the fore-said back bond; so, it is plain, that, in as far as *Innes* and *Clark* were creditors to *Plaids*, that they were prior and preferable to the reversionary right which was in *Plaids*, and which now stands vested, by progress, in the person of the defender.

Accordingly, the Lord Ordinary, by his interlocutor of the 11th February 1766, " Found, that the pursuer is intitled to insist, that the defender shall denude in her favour, in so far as the said pursuer shall instruct, *Innes* and *Clark* were creditors to *Plaids*." And although your Lordships, by your interlocutor of the 26th November 1766, did so far vary the Lord Ordinary's interlocutor, as to find, " That the defender, Mrs. *Jean Hay*, shall be obliged, before she draw the money in question, to find sufficient caution for paying back and repeating the same to the petitioner, and her husband, or what part thereof they shall be found intitled to in the event of this process;" yet your Lordships did not thereby mean in the least to weaken the right or security of the petitioners, but on the other hand to strengthen it. It might have happened, that the money might have been ready to be paid over by the public, before the petitioners claims were in any degree liquidated or ascertained; and as the defender would, in that case, have been intitled to draw that money from the public, so the fore-said interlocutor was very properly calculated to secure the petitioners from being disappointed of their payments by the defenders dilapidating the funds before the petitioners claim should be ascertained; but as the petitioners claims are clearly ascertained to a certain extent, and as the money is still *in medio*, they humbly apprehend, that they, whose right is clearly preferable to that of the defender's, should themselves draw the money preferably to the defender, in so far as their claims are ascertained.

It is not a matter of indifference to the petitioners, to allow the defender to draw the money from the public, leaving it to the petitioners to draw their payments from the defender, when the present action is finally concluded. The greatest part of the petitioners claim consists of bygone interest. There is about 60 years

years interest due upon the money that was advanced by *Innes* and *Clark* to *Plaids*, and for his behoof. All this is a dead stock, bearing no interest to the petitioners; and will remain so, until they receive their payment; and therefore, with submission, it would be highly inequitable, to allow the defender to draw the money, when, at the same time, the petitioners, who have the *prior and preferable right*, must not only ly out of their money, till the final conclusion of this cause, but the bulk of their claim is a dead stock, bearing no interest. It is plain, that, by allowing the defender to draw the whole, he not only gets the use of the money, which *truly belongs* to the petitioners, but, as to the bulk of it, he gets the use of it without interest.

The petitioners have been already kept in court for several years, by a litigation maintained with a very uncommon and extraordinary degree of obstinacy upon the part of the defender and his predecessor, with a view, if possible, to possess themselves of the money in question before the petitioners claims should be finally ascertained: And, if the defender shall once be allowed to possess himself of the money, which is now ready to be paid by the public, the petitioners are afraid, that pretences may be fallen upon, which have not been wanting in this case, for keeping the matter in dependence for years yet to come; and therefore, as the petitioners right is clearly preferable to that of the defenders, in so far as their authors, *Innes* and *Clark*, were *creditors* to *Plaids*, the petitioners are humbly persuaded, that your Lordships will be of opinion, that they are entitled to draw preferably to the defenders, in so far as their claims are already liquidated and ascertained.

L. s. d.

By Mr. Ludovick Grant, the accomptant's report, and which has been approved of by the interlocutor of the Lord Ordinary above-recited, long ago final, the principal sums thereby sustained to have been advanced by *Innes* and *Clark*, for *John Cuthbert of Plaids*, amount to —

9055 5 8

C

Carried over, 9055 5 8

	L.	s.	d.
Brought over,	9055	5	8
To be deducted 1071 l. Scots, received by Innes and Clark from Mr. Sinclair of Ulbster, with interest from Whitsunday 1694 to the year 1710	1928	18	2
	<hr/>		
Remains,	7126	7	6

The above sums were advanced in 1709, 1710, 1711, and 1712; but, as the bulk of them was advanced in the 1710, therefore, supposing the interest of the whole to be stated from the 1711, <i>inde</i> , for 59 years interest, the sum of			
	—	21,022	16 8
The <i>present</i> free rent of the lands of West Canisby, as established by the interlocutors and proof in process, amounts to 191 l. 6 s. 3 d. Scots: The petitioners, by the interlocutors already pronounced, have been found accomptable for these rents from the 1719: But, supposing that they should be found accountable from the 1710, the commencement of Innes and Clark's right, and supposing that the rents should be held to be the <i>same</i> from that period, <i>inde</i> for 60 years			
	—	11,508	6 6
	<hr/>		
Balance due to the petitioners in this view	—	16,640	17 2

The above balance is clearly due to the petitioners; no possible objection can be made thereto; and therefore, they humbly hope, that your Lordships will have no difficulty to find and declare, that they, as in the right of *Innes* and *Clark*, are creditors to *Plaids*, to the amount of the foresaid balance, and are therefore intitled to draw, to that amount, out of the money that has been granted by Parliament for payment of the debts affecting the forfeited estate of *Cromarty*, preferably to the petitioners.

May

[11]
May it therefore please your Lordships, to take the premisses under your consideration, and to find and declare, that the petitioners, as in the right of Innes and Clark, are just and lawful creditors to Plaids, in the foresaid sum of 16,640 l. 17 s. 2 d. Scots; and, that they are entitled to draw, to that amount, preferably to the defender, out of the sums for which the claim, entered by the Lady Castlehill, upon the forfeited estate of Cromarty, was sustained; and, in the mean time, to allow a partick of the decreet to be extracted, for that purpose.

According to justice, &c.

RO. MACQUEEN.

Edinburgh, 6th. July 1770. I Adam Stewart, clerk to David Lothian, writer in Edinburgh, doer for the petitioners, did intimate to James Frazer, writer to the signet, doer for the defender, and also to David Stewart-Moncrieff, Esq; secretary for forfeitures to the Barons of exchequer, That copies of this petition were to be boxed this day, in order to be moved by the Lords to-morrow: This I did, by delivering to the said James Frazer, and David Stewart-Moncrieff, severally, a copy of this petition, with a note of intimation to the above effect, thereto subjoined, before these witnesses, James Stewart and John Macintosh, both writers in Edinburgh.

This Petition refused

NOTE of the present Rental of *West Canisby*,
referred to in the foregoing Petition.

	<i>Viſtual.</i>	<i>Money.</i>
	B. f. p. l.	L. s. d.
Groſs rent of <i>West Canisby</i> , <i>per</i> proven rental in proceſs — —	49 2 1 0	105 0 4
Deduct ſtipend to miniſter of <i>Canisby</i> , <i>per</i> ſaid proof — — —	9 3 3 2	5 10 4
Remains	39 2 1 2	100 10 0
Deduce $\frac{1}{2}$ for teind, <i>per</i> Lord Ordinary's interlocutor — — —	7 3 2 2	20 2 0
	31 2 3 0	80 8 0
The above 31 b. 2 f. 3 p. at 4 l. 3 s. 4 d. the con- verſion eſtabliſhed by Lord Ordinary's interlocu- tor, long ago final — — —		132 15 3
Deduct ceſs <i>per</i> proof — — —		213 3 3
		21 7 0
Free rent		191 16 3

Nota, From the proof it appears, that the viſtual rent was, ſeve-
ral years ago, leſs ſome bolls than it is at preſent.

DECEMBER II. 1770.

UNTO THE RIGHT HONOURABLE
The LORDS of COUNCIL and SESSION,
THE
P E T I T I O N
O F

ALEXANDER CUTHBERT, Esq;

HUMBLY SHEWETH,

THAT in the question between the petitioner defender,
and Mrs Elisabeth Dunbar and James Sinclair of Durin,
Esq; her husband, for his interest, pursuers, your Lord-
ships, of this date, pronounced the following interlocutor: "On Nov. 29. 1770.
report of Lord Gardenston Ordinary, and having advised in-
formations given in, the Lords find the pursuers accountable
for the rents of the lands of West Canisby for crop 1709 and
subsequent years, and remit to the Lord Ordinary to proceed
accordingly."

This interlocutor, in so far as it has found the pursuers ac-
countable for the rents of West Canisby only from the year
1709, and not from 1694, the petitioner must beg leave to sub-
mit to your Lordships review. When this cause was formerly
under consideration, it was branched out into such a variety of
points, and was perplexed with such a multiplicity of facts and
circumstances, that it was difficult to present, in a clear light,
the argument upon that point which is the subject of this peti-
tion.

tion. As the petitioner can now disengage it from extraneous matter, and, as he apprehends, place his argument in a light somewhat different from that in which it has been hitherto viewed, he humbly presumes to bring it again under the consideration of the court.

In order to apprehend the argument to be insisted upon, the nature of the rights of the pursuer and defender, merits particular attention; and may be very shortly brought to your Lordships recollection. Both parties derive their rights from John Cuthbert of Plaids, who, besides several subjects of his own, had, as heir and representative of his granduncle Alexander Cuthbert provost of Inverness, right to the subject of certain apprisings, obtained by the said Provost Cuthbert against the estate of Sir William Sinclair of Mey.

After a judicial sale of the estate of Mey, a decret of ranking was pronounced in favour of the creditors; and thereby, besides certain sums in the hands of different purchasers at the sale, "there were adjudged to the representatives of Provost Cuthbert, the three penny three farthing and an half octo land of the lands of Canisby, holding of the King, &c. in payment of the remainder of the debt due to the provost, no purchaser having appeared for these lands." And the decret further declares the provost's representatives to have right to the rents, mails, and duties of these lands, from the term of Whit Sunday 1694, and in time coming.

John Cuthbert of Plaids did, by a deed 15th August 1706, constitute Robert Innes of Moodie, and Alexander Clark one of the bailies of Inverness, his factors, for intronitting with and receiving his various fund, and in particular the rents of the aforesaid lands of Canisby. On the other hand, by back bond of the same date, the said factors became bound to make just count, reckoning, and payment to the said John Cuthbert, of what sums of money they should happen to recover from all or any of his debtors and tenants, and to communicate any cases they should obtain in compounding with his creditors; deducting always, in the first place, all sums they should happen to disburse, with a competent salary for their own pains and trouble in negotiating and managing his affairs.

Afterwards, the better to enable them to attain possession of his

his different funds, he did, by a deed, of date 21st October 1709, assign and dispone to them his various subjects; and in particular the lands of Canisby, *with the mails and duties thereof, bygone and to come*: And, on the other hand, they granted a back bond, pretty nearly in the same terms with the former, obliging themselves to make just count, reckoning, and payment, to the said John Cuthbert, his heirs and assignees, providing, that out of the first and readiest of any sums of money, arising or to be received, they are allowed to retain in their own hands, as much as will completely satisfy and pay all debts due to themselves, and a competent salary for their pains: And farther, obliging themselves to bring the subject of the adjudications against the estate of Mey to a period twixt and the end of the 1710.

This disposition, 21st October 1709, having been considered as too general, a second was executed, 30th January 1710, more specially transmitting to them his subjects, particularly the lands of Canisby; and besides procuratory of resignation, and precept of seisin, the disposition contains an assignation to the mails and duties for bygones and in time coming. Innes and Clark granted, of the same date, a back bond, conceived in terms, in no material particular different from the former.

These different rights granted by Plaids to Innes and Clark, have come, by progress, into the person of Mrs Elisabeth Dunbar, the present pursuer.

So early as the year 1713, Plaids perceiving that Innes and Clark did not manage properly or faithfully, granted to John Cuthbert of Castlehill a conveyance to the subjects formerly conveyed to Innes and Clark, and to their back bonds, empowering him to ask and obtain from them just count, reckoning, and payment of their intromissions: "And if need be, to pursue therefor, in his own name, and to hinder and impede any agreements with any of my debtors, that may be made by them unfrugally or to loss." At the same time Castlehill granted a back bond, declaring the conveyance to him, to be in security of the debts therein particularly mentioned, due to him by Plaids, and obliging himself to account for his intromissions. Immediately afterwards Castlehill brought a process
against

against Innes and Clark, to account for their intromissions, and to oblige them to denude in terms of their back bonds; and, upon the dependence, he used both inhibition and arrestments. This process was afterwards frequently renewed and insisted in, as shall, in the sequel, be more particularly mentioned.

Castlehill having conveyed to his wife, the petitioner's mother, all his subjects, and, *inter alia*, this disposition from Plaids, she, in 1749, entered her claim upon the forfeited estate of Cromarty, for payment of the sum for which, by the above-mentioned decret of ranking of the creditors of Mey in 1695, the heirs of Provost Cuthbert had been ranked upon the price of that part of the estate of Mey which had been purchased by the Earl of Cromarty; and, after a long litigation, her claim was sustained by an unanimous judgement of this court in 1762.

John Cuthbert of Plaids, in the full conviction, that Innes and Clark, by their intromissions with his various subjects, were his debtors, did not only grant the aforesaid conveyance to Castlehill in 1713, but did afterwards, by his latter-will and testament, dated 25th March 1715, constitute his only daughter Margaret Cuthbert his assignee to Castlehill's back bond; and likewise gave her full power to pursue and recover all sums due to him by Innes and Clark.

The said Margaret Cuthbert, the daughter and disponee of Plaids, did, in the year 1752, grant to the petitioner's mother a disposition of all lands, heritages, and other rights, which had belonged to her father, together with a ratification of all rights granted by him to the above-mentioned John Cuthbert of Castlehill; and the petitioner, by assignation from his mother, acquired right to all that she had in virtue either of the disposition from her husband Castlehill, or of the conveyance from the said Margaret Cuthbert.

Thus your Lordships perceive the right of the pursuer is derived from Innes and Clark, the factors and managers for Plaids, who were held to be so largely his debtors, so early as the year 1713, that he executed the conveyance to Castlehill, and afterwards to his own daughter, to call them to account. The petitioner, on the other hand, is not only in the right of Castlehill, in consequence of the assignation by his mother, but likewise in the right of Plaids himself,

himself, in virtue of the disposition from his heir and representative.

After Castlehill had interpellated Innes and Clark, by the process brought against them in 1713, and the inhibition used thereupon, they appear to have been so sensible of their being already possessed of much more of Plaids's effects, than they had any right to, that they never afterwards thought of attempting to get payment of the debt due by Lord Cromarty; and when the petitioner's mother carried on her action against the crown for obtaining payment of that debt, and called Sir Patrick Dunbar to appear as a haver, for producing papers to support her claim, he did not attempt to interfere with her, except in so far as to enter a protestation, that his producing these writings, in obedience to a diligence executed against him, should not prejudice his right, but that the same should be reserved.

The pursuer, Sir Patrick's daughter, however, did, within these few years, bring the present action, to oblige the petitioner to denude in her favour of that claim, and the decret sustaining it.

Your Lordships found the petitioner was not obliged to denude, any further than the pursuer should show Innes and Clark to be creditors of Plaids. The pursuer at first pretended Innes and Clark to have been creditors to the extent of no less than L. 30,000 Scots, conform to an account given out with her summons, without admitting any intromissions whatever, or giving credit for a sixpence on that account. In her after-condescendences, she was pleased to acknowledge, that her father Sir Patrick Dunbar attained possession of the *small* farm of Canisby at Whitsunday 1719; but, at the same time, obstinately denied any further intromissions either by herself or her authors, until they were clearly instructed against her in the course of this process, which has necessarily put the defender to a very considerable expence.

After a variety of litigation, unnecessary to be mentioned, a question arose, From what period the pursuers should be held accountable for the rents of the said lands of Canisby? Any possession previous to the year 1719 was obstinately denied; and yet convincing evidence has been now brought, that Innes and Clark entered into possession in the year 1709; and your Lordships have accordingly found the pursuer accountable for the

rents from that period ; and the petitioner humbly hopes he shall be able to satisfy your Lordships, that the pursuer must be farther chargeable with the rents of these lands from 1694 to 1709.

The pursuer, from the beginning of this process, has averred, in all her papers, that Innes and Clark having made large and generous advances for Plaids, of sums now amounting to about L. 2000 Sterling, they, for their security and relief, had obtained from him the different factories and conveyances upon which they found ; but that being utter strangers in the remote county of Caithness, they had never been able to make any of his funds effectual, except the *small* farm of Canisby, of about 200 merks yearly rent, of which Sir Patrick Dunbar, by means of his influence in that distant county, was at length able to attain possession at Whitsunday 1710. From this supposed state of the fact, the pursuers inferred, that Innes and Clark were truly no other than *creditors in security*, at liberty to enter into possession or not as they should think proper ; and that therefore the pursuer, in their right, could be chargeable with no other intrusions than such as should be clearly and distinctly proved, by such evidence as would be held sufficient in a common action for debt.

The petitioner was not at first in a condition to refute these allegations. It was not him but the pursuer who had possession of the papers of Innes and Clark. Sixty years had destroyed all evidence, and almost all memory of the transactions of so distant a period. Notwithstanding all this, these assertions of the pursuer have been shown to be erroneous in every particular.

Innes and Clark, in place of being creditors of Plaids, to a considerable amount, when these conveyances were made to them, appear clearly not to have been a shilling in advance for him, except L. 348 Scots, by a bond to Innes, in 1724. The first deed, 15th August 1706, constitutes them merely his factors. The only alteration which the after deeds, 21st October 1706, and 30th January 1710, make, is, that the subjects intrusted to their management are more effectually vested in them, and with more ample powers of administration.

Even from their own account of the sums which they expended, and which are dated in the years 1710 and 1711, it is clear, that

that they must have made them out of the effects of Plaids, with which they had by that time intromitted. The first sum which was disbursed by them as trustees, was [no earlier than the 20th October 1709. It has been proved, and is now admitted by the pursuer, that in November 1710, Innes and Clark had obtained payment of the debt due to Plaids by William Innes, one of the purchasers of Mey's estate, amounting then to about L. 2000 Scots. It has been further proved, to your Lordships satisfaction, that in 1709 they entered into possession of the lands of Canisby; and there were various other funds conveyed to them by Plaids, with which, there is the utmost reason to believe, they intromitted.

Thus it appears, that notwithstanding the difficulties under which the petitioner has laboured in this cause, he has been able to refute the assertions of the pursuers. In place of being *creditors in security*, it has been shown, that when Innes and Clark were appointed factors, and received the different conveyances from Plaids, they had hardly advanced any thing for him; and that all which they afterwards expended upon his account, was in the character of his factors or trustees, and out of the funds which were put into their possession.

From the nature of their rights, they were bound to exact diligence in the management of his affairs. As they were not creditors in security, so neither were they acting gratuitously, but conditioning a competent salary for their trouble. They were further intitled out of the first and readiest of the sums which they should receive, to retain in their own hands payment of whatever they should expend; and it was expressly stipulated, that they should make just count, reckoning, and payment of any sums with which they should intromit.

These, it is humbly apprehended, are the circumstances, which must make any factor or trustee bound to such *diligence* as every prudent man would use in the management of his own affairs notwithstanding of a conditional exemption from mere neglects or omissions, usually stipulated in all such trust-rights, as well as in the appointment of tutors and curators, and other offices of that nature, but which was never supposed to imply an acquittance either from a fair accounting, or from a proper regular administration of the trust, in any other particular. It is not however, upon any implied obligation arising from the
general

general nature of the trust, that the petitioner founds his argument in the present case. He humbly hopes to make it appear, from the express words of their back bonds, that the trustees, and those in their right, fall to be charged with the rents of the lands of Canilby from 1694.

It is material to observe, that by the first deed, dated 15th August 1700, Plaids did not convey to the trustees any of his interests, but appointed them only his *factors* for recovering all debts and sums of money due to him; and in particular the rents *due* by the tenants of Canilby. The lands themselves were not conveyed by this factory, nor were the trustees assigned to the rents of them in time to come. The sole object of the factory, in so far as concerns these lands, was the bygone rents of them preceeding that period, which, by all concerned, were understood to be still *in media*.

This will best appear from the words of the factory itself; whereby the said John Cuthbert made and constituted “Robert
“ Innes of Mondole, and Mr Alexander Clark, one of the bailies of Inverness, his very lawful factors, actors, and special
“ errand-bearers, for meddling, intromitting with, and receiving all debts and sums of money whatsoever, and others,
“ any manner of way *due* and *admitted* to the said John Cuthbert, whether heritable, real, or moveable, by an noble and
“ potent Earl, George Earl of Cromarty, *Sir James Sinclair of*
“ *May, and the tenants and possessors of Easter Canilby*, sometime belonging to the said Sir James Sinclair, and for meddling and
“ intromitting with the sum of 6000 marks, &c. with full power,
“ liberty, and faculty, to the said factors, to call for, meddle,
“ and intromit with all sums of money, and others whatsoever, any manner of way *due, rising, and admitted* to the
“ said John Cuthbert, by all and every one of the above-designated *debtors and tenants of Easter Canilby*, for whatsoever cause or
“ occasion, with power to them *to call and pursue thereof*, as accords; and upon payment, to grant receipts and discharges
“ thereupon,” &c.

It seems therefore evident, that one of the special subjects of this factory was the bygone rents of Canilby from 1694, whether in the hands of Sir James Sinclair or the tenants, without any respect to the after possession of these lands, or the rents in time to come. And by the relative back bond of the same date, the trustees

trustees became bound to make just count, reckoning, and payment of whatever they should recover from all or any of the said debtors and *tenants*. It is therefore obvious, that these bygone rents were well understood and known by the parties concerned to have been still unuplifted by Plaids; and that such truly was the fact, the petitioner apprehends to be unquestionable, from a variety of circumstances formerly laid before your Lordships. For, *1mo*, Plaids appears to have been so unacquainted with these lands, that in the first and second deeds, they are denominated the lands of *Easter Canisby*; whereas they are truly the lands of *Wester Canisby*. *2do*, As they were, by the decreet of division, adjudged to the *representatives* of Provost Cuthbert in general, and as Plaids never made up any title to them as his heir, so there is no probability that upon the title of so remote an apparenacy to his granduncle, he should have attained possession of lands wherein his predeceffor had neither been infest nor in possession; more especially, if any opposition had been given by the family of Mey, as the pursuers have averred. *3tio*, The only title that has ever yet been made up to these lands, is the trust-adjudication in the trustees person upon Plaids's back bond, which also adjudges the bygone rents from 1694; so that they were the only persons intitled to the possession of these lands, or to uplift the bygone rents of them. And, *4to*, George Mouat, one of the present tenants, and Mr Brodie minister of Canisby, concur in deponing, that they heard from some of the old tenants of these lands, *that they were for several years that they did not pay any rents before Sir Patrick Dunbar's time*; and one of them mentions the precise number of *sixteen* years, which exactly corresponds with the period now in dispute.

By the second deed, executed within two months of the first, the lands of Canisby themselves, with the mails and duties thereof, *bygone and to come*, were; together with the other subjects, conveyed and disposed to the trustees, under back bond, containing the same obligations to account as formerly, and with this additional clause, which merits particular attention, *viz.* “ And the said Robert Innes and Alexander Clark, bind and oblige them, and their forefaids, to bring the subject of the forefaid apprisings against the said estate of Mey, with what ensued thereupon, to a period and conclusion, by a friendly agreement with the Earl of Cromarty, betwixt the date here-

“ of and the day of 1710; or else,
 “ if the saids Robert Innes and Mr Alexander Clark cannot
 “ agree therein, to intent a legal process against all parties con-
 “ cerned, and prosecute and follow forth the same until the
 “ final end thereof, upon the said John Cuthbert his charges
 “ and expences,” &c.

Your Lordships see, that by this clause the trustees became expressly bound to bring the *subject of the appraisings against the estate of Mey, with what ensued thereon*, to a period and conclusion, betwixt and the end of the year 1710, or otherwise to bring a process against all parties concerned, and prosecute and follow forth the same. The petitioner therefore humbly apprehends, that he is intitled to subsume in the terms of this obligation; that the pursuers, as in the place of the original trustees, must be chargeable with the bygone rents of the lands of Canisly, from 1694, which were undoubtedly part of the subject of the appraisings against the estate of Mey, unless they can shew, that they brought the claim for these bygone rents to a *period and conclusion*, either by a friendly agreement, or by a process against all concerned. If they did this, and nevertheless failed to recover them, by the insolvency of tenants, or any other such accident, they can only be chargeable with what shall appear to have been recovered by them, either in virtue of the agreement, or in consequence of the process raised by them. But if they took no step whatever, either by process or agreement, and do not so much as offer an account of what was, and what could not be recovered from the tenants or others who intromitted with them, it is humbly submitted, if they must not be charged with these bygone rents, agreeable to the express terms of their own obligation.

The pursuer perhaps will say, that in respect of the method suggested in this clause of bringing matters to a period, by a friendly agreement with the Earl of Cromarty, the obligation therein contained must be understood to be confined to the particular debt due by him, as one of the purchasers at the sale of the estate of Mey. This, however, is altogether erroneous. The obligation expressly comprehends the *whole* subject of the appraisings against the estate of Mey, with what ensued thereon. These your Lordships have already had occasion to know, were not only the debt due by Lord Cromarty, as one of the purchasers

chasers at that sale, but likewise a debt due by William Innes writer to the signet, as purchaser of another lot for Mr Sinclair of Ulbster. And, 3^{dly}, The property of the lands of Canisby, and bygone rents thereof from Whitsunday 1694. Accordingly your Lordships see the trustees proceeding, by application to this court, not only for registration of Lord Cromarty's bond, but also for registration of William Innes's bond so early as the month of July 1710; and, in the month of November of that same year, as soon as they had made up their title by adjudication upon Plaids's trust-bond, they made Innes's debt effectual, by recovering full payment thereof. It is now instructed, that they likewise attained possession of the lands of Canisby in 1709. And what should exempt them from being bound to take the like measures for making the bygone rents effectual, the petitioner must confess he cannot discover: for not only the express words of their obligation, but their proceedings, show plainly, that the whole subject of the appraisings against the estate of Mey, were comprehended under it.

It has been said, and may perhaps be again repeated, That it is improbable the trustees should be able to have recovered sixteen years bygone rents from the tenants, which were owing in 1709, when the factory was granted. If the pursuer, as in the right of the trustees, can make it appear, that they did what was incumbent upon them, in terms of their obligation, the petitioner will admit, that they are not chargeable with what was irrecoverable by the bankruptcy of tenants, or otherwise; but if they failed to take any one step that was incumbent upon them, and do not so much as offer to show any account of what was recovered, and what was lost, the petitioner humbly submits, whether he, as in the right of Plaids, or the pursuers, who can only claim in the right of the trustees, should be the sufferers. At the same time there is the utmost reason to believe, that very few, if any, of these bygone rents were truly lost; because it has been instructed from evidence in process, that several of the possessors in 1694 were continued in the possession down to 1719, which can never be supposed to have happened, if they had not paid up the bygone rents; and if the family of Mey, or any other family of consideration or circumstances, intromitted with them, the trustees could have been at no loss to oblige them to repeat.

Much

Much weight has been laid upon the clause, whereby the trustees are declared to be accountable according to *their intromissions, but not obliged for omissions*; but this surely cannot relieve them from the express obligations above mentioned. If such a clause could admit of this interpretation, it would go the length of relieving all trustees and tutors, declared free from omissions, from every obligation whatever, as well those expressed in the deeds appointing them, as all others arising from the nature of the office. The petitioner will admit, that this clause would have the effect to excuse the trustees for not proceeding to the most rigorous diligence against the tenants or debtors, provided they can show, that in terms of their obligation, they concluded matters by agreement, or by raising process, and recovering decreet, although they may have omitted to carry that agreement or decreet into execution, by not doing diligence in due time, or in the most exact manner. If, farther, the pursuers could show, that they transacted or compounded the bygone arrears upon any prudent or reasonable grounds, the petitioner might admit, that they could be chargeable only with what they actually received or intromitted with. But he humbly submits, that this is all the length the argument can be carried.

But supposing your Lordships should have any difficulty in finding the pursuer chargeable with the full amount of these bygone rents, by which it is probable they would be found overpaid, and a balance remaining due to the petitioner, he must humbly submit to your Lordships, in the *second* place, that the pursuers are not intitled to insist against him, to denude of a separate subject, which, though originally conveyed to the trustees, they were afterwards interpellated from intromitting with, until they should account for former intromissions.

By their several back bonds, James and Clark became expressly bound to make *just count, reckoning, and payment* to Plaintiff, his heirs or assignees, of any sum or sums of money, they, or any of them, should receive from any persons, by virtue of the factories and dispositions made to them.

In place of fulfilling this obligation, they have, though repeatedly called upon, constantly avoided giving any account whatever of their intromissions, and have concealed every thing with the most anxious care.

The petitioner does therefore, with great submission, apprehend, that according to the very terms of her own right, the pursuer is bound to render an exact account of her authors intromissions with the other funds of Plaids, before she can be intitled to lay hold of that fund, which is now the subject of controversy.

The petitioner is not only in the right of his father Castlehill, who obtained the conveyance 1713 to the trustees back bond, but he is likewise in the right of Plaids himself, in virtue of the disposition from Margaret Cuthbert, his heir and representative. The pursuer is the *factor* of the *petitioner*, and is now attempting to wrest another fund out of his hands, without offering, in terms of her right, to make just count and reckoning of the intromissions she has already had.

Another particular in the pursuer's rights strongly supports the argument of the petitioner. Intromission by tutors and curators is held in so far equivalent to payment of the debts due to them, as to bar them from pursuing *ante redditas rationes*. The same reason which has established this with regard to tutors, it is humbly apprehended, must apply to the case of the pursuer. Tutors and curators are barred from pursuing *ante redditas rationes*, because they are impowered, *virtute officii*, to apply their intromissions for payment of the minor's debts. It is not incumbent upon them to advance money out of their own pockets, but only out of the funds of the minor with which they intromitted.

If, however, a factor is, by the terms of his right, expressly impowered to do what the tutor is intitled to do *virtute officii*, the same rule must apply to him. Accordingly, in those cases in which your Lordships have found a factor not in the situation with a tutor, it has been where he was understood "to be no more but a hand for holding his constituents money, without any power to apply his intromissions for payment of debt;" 7th January 1680, Macbride *contra* Lord Melvil, 17th January 1717; Menzies *contra* Littlejohn, Dictionary, *voce* Payment, vol. II. p. 51. Such however is the case of the pursuer; for her authors, by their rights, were expressly impowered and allowed out of the first and readiest of any sums of money arising or to be received, to retain in their own hands as much as would completely satisfy and pay them for all they should expend. And this argument is much strengthened, by remarking, that when the conveyances

were made to Innes and Clark, they were not a shilling in advance for Plaids, which shews that any sums which they expended upon his account, were entirely out of the funds which he put into their possession.

All this is strongly confirmed, from observing that there is good reason to presume, these factors or trustees intrusted with much more than they ever expended. For, 1st, The pursuer has not only refused to give any account whatever of her authors intrusions, on pretence of being a singular successor not liable to account, but has obstinately denied intrusions which have been since clearly proved against her.

2^d, Plaids himself was so conscious of the trustees being overpaid by their intrusions, that, in 1713, he granted the conveyance to Castlehill to call them to account; and in 1715, by his later will, granted like powers to Margaret Cuthbert his daughter. These circumstances merit particular attention. Castlehill was creditor to Plaids; and if it had not been certain that Innes and Clark were debtors to Plaids, giving power to call them to account, would neither have been accepted of by Castlehill, nor granted by Plaids. And, for the very same reason, Plaids would never otherwise have conveyed this power to his daughter. Your Lordships, besides this, perceive Castlehill immediately bringing a process against them, using arrestment thereon, and frequently reviving this process, although, partly from the evasion and artifice of the trustees, and partly from the accidental circumstances of the family of Castlehill, these processes were never brought to an effectual conclusion.

3^d, Your Lordships perceive these trustees, after the process brought against them in 1713, never attempting to seek any further possession of Plaids's effects, but allowing the defender to enter and prevail in the claim upon the estate of Cromarty, without ever interfering; which conduct must have proceeded from a consciousness that they had been greatly overpaid, and that they would be well contented, if, by remaining silent, their possession of the lands of Canisby might chance to pass unchallenged.

And, lastly, the nature of the disbursements for which they claim credit, merits attention. A few of them appear to have been made in 1709; but most of them in 1710 and 1711, after they had got possession of the lands of Canisby, and intrusted
with

with other effects belonging to Plaids. They appear to have been all mere disbursements, under the trust-right, out of the funds with which they had intromitted; and the vouchers of most of them are of such a nature, that they could never be sustained in a common action for debt, as will appear to your Lordships, from a specimen of a few of them annexed to this petition.

There is only one other particular with which the petitioner shall now trouble your Lordships. The nature of the rights of Innes and Clark has been fully explained; and it has been shown, that, in place of being creditors, they were mere factors, provided with a competent salary. That salary the pursuer does now claim; and the consideration of her demand has been remitted by the Lord Ordinary to the accountant. The nature of the disbursements which the trustees pretend they have made for Plaids, and the vouchers by which they pretend to support them, have been likewise mentioned. When these particulars are considered, the petitioner humbly submits, if, while he is so rigorously bound to submit to every claim of his *factor*, that *factor* should be permitted to free himself at once from all the obligations to which he became bound, and be relieved from communicating eases, or rendering any account of his various intromissions.

The obstinate denial in which the pursuer persisted, of her or her authors having had any intromission with the subjects of Plaids, has put the petitioner to the great expence of different acts and commissions to the remote county of Caithness, for proving them. She denied the trustees ever having got payment of the debt due by William Innes; and yet that has been proved and admitted. She denied any possession of the lands of Canisby before 1719; and yet the previous possession of the trustees has been distinctly proved. What ought to be the consequences of such positive denials so fully disproved? What ought to be the consequences to factors so confidently denying intromissions for which they were bound to account, and which have been so clearly established against them? The pursuer's father, Sir Patrick Dunbar, not only acquired from the original trustees all their rights, but got into his possession all their papers. For some years preceding 1719, Sir Patrick not only knew, but was himself concerned in uplifting the rents of Canisby for these trustees;

trustees; and, besides, was a man remarkably accurate and distinct in business. To Sir Patrick the pursuer's daughter succeeded, and thereby became possessed of all the rights of the original trustees, as well as subject to all their obligations. She is liable to account in the same manner with them, and cannot be supposed ignorant of their intromissions. Her confident denials have put the petitioner to very considerable expence. That expence, he humbly apprehends, the pursuer ought to refund to him; and the justice of his demand he humbly submits to your Lordships. The means which were employed to prevent him from being allowed these proofs, the artifices which were used to disappoint them, only betray the pursuer's consciousness of the effect which they would have; and he shall not now trouble the court with explaining them.

He shall therefore conclude, with mentioning, that, in praying a review of the last interlocutor, he has had no intention to delay the final issue of the cause. He has agreed, that the accountant shall, in the mean time, proceed in preparing his report; and he has submitted this question again to consideration, only from his humbly apprehending, that the facts and arguments will appear in a point of light in which they have not been before viewed.

The pursuer has indeed been pleased to alledge, that the petitioner was to blame, in charging her with having obtained the possession of funds with which neither she nor her authors ever intromitted, and which too she alledged must have been consistent with the petitioner's own knowledge. The particulars upon which she has condescended are, *1^{mo}*, Some burgage-tenements in Inverness; *2^d*, the requiring her to account for certain subjects, mentioned in an inventory signed by her authors the trustees, relative to the trust-rights, or else restoring these papers; and, *3rd*, a bond of provision granted by Sir James Dunbar for the sum of 6500 merks to his sister who married Plaids.

As to these the petitioner shall say a very few words.

With respect to the tenements in Inverness, the petitioner humbly apprehends he had much reason to charge these trustees with them: For, *1st*, they are specially mentioned in the above-mentioned inventory of writings delivered to the trustees. *2^d*, Some of these tenements were specially adjudged from Plaids by the trustees upon the trust-bond which they obtained from him

in 1710. And, *3tio*, There is an article in the trustees accounts produced in process, stating, *for going to Inverness, and staying there for four days, in order to sell John Cuthbert's houses.*

As to the demand of accounting for the subjects mentioned in the inventory of papers, the petitioner shall only observe, that it was not very unequitable, that he should require his own *factor*, either to account for the subjects which it appeared from that inventory had been conveyed to him; or else that the papers themselves should be restored. It would be improper to trouble your Lordships now with explaining the nature of that inventory, and these papers; and therefore he shall only observe, that they afford the strongest reason to presume, that these trustees had intronission with many more funds belonging to their constituent, than can be now clearly or fully detected. The pursuer was relieved of this article of charge, chiefly on pretence of her authors being creditors, and not factors, and being a singular successor; but had the nature of their rights been as well understood when that question was under consideration as they are now, it is believed she would have difficulty to get free from it.

With regard to the bond of provision for 6000 merks, it will be observed, that it was clearly conveyed to the trustees in their several dispositions; and therefore the petitioner had reason to believe, they had obtained payment thereof. The care with which the trustees avoided giving any account of their intronissions, and the mysterious concealment in which they endeavoured to keep all their transactions, kept him and his predecessors in profound ignorance with regard to them. In 1734, when Castlehill, the son of the original trustee, brought a process in virtue of the rights from Plaids to his father, against the representatives of Innes and Clark, who were then dead, and against Lord Cromarty, Bowermadden, and William Innes, concluding for exhibtion of various writings, denuding payment, &c. it appears, from the summons itself, that he was so totally unacquainted with the nature and extent of the trustees intronissions, that he concluded against William Innes for payment of the debt due by him to Plaids, although it is now proved to have been paid by Innes to the trustees in 1710; and yet this is the summons upon which the pursuer founded abruptly at the bar, when the cause was last before your Lordships, as

concluding against them for the possession of the lands of Canisby only from 1711; whereas that conclusion seems chiefly directed against Sir Patrick Dunbar, as there is a separate one against the heirs of the trustees, for no less than 50,000 merks of other intromissions, in which were undoubtedly included the bygone rents of Canisby.

May it therefore please your Lordships, in so far to alter your former interdict, as to find the pursuer accountable for the rents of the lands of West Canisby from the 1694 to 1709; at least, that she cannot insist against the petitioner to demand of any other subject, till she account for these bygone rents; and, at any rate, to find her liable to the petitioner for the expence incurred in taking the proof to establish the intromission with the rents of Canisby before the year 1719, and for instructing the intromission with William Innes's debt.

According to justice, &c.

ROBERT CULLEN.

Excerpts from the Accountant's Report, with respect to the debts claimed by the Pursuers, referred to in the preceding Petition.

THE 8th article claimed, and said to have been paid by the trustees, *per discharge* and assignation, dated 23d May 1712, is a sum of no less than L. 1185: 13: 4 Scots.

The vouchers relative to this article consisted of three bonds, granted by John Cuthbert to one Donald Mackay, and no less than thirteen accounts. But there is only produced in process one of the three bonds, containing L. 84: 6: 4 Scots, and one of the signed accounts, containing L. 331: 17: 10 Scots; which having been objected before the accountant, it was answered, That the pursuers were in the right of a decret proceeding on the whole bonds and accounts at Margaret Innes's instance, as executrix of Donald Mackay before the commissaries of Inverness; and therefore their discharge would spite the decret, and the grounds of debt on which it proceeds. Whereupon the accountant gave his opinion, that the article fell to be sustained, and the objection repelled, although it is plain, that this article could not be sustained at the instance of an ordinary creditor, in an action for debt, without production of the grounds of it.

In the 1710, two years before it was transacted, John Cuthbert granted a precept or order upon the trustees, of the following tenor; which shows this article was a disbursement from funds supposed to be in the trustees hands, and not an advance by them. “ *Elgin, 9th February 1710, Gentlemen, at the*
 “ term of Whitsunday next to come, in this current year 1710
 “ pay to Margaret Innes, relict of the deceased Daniel Mackay
 “ messenger in Inverness, or order, the sum of L. 1530: 11: 4
 “ Scots money; and that as the neat and just balance due by
 “ me to her, after our counting, upon the respective sums due
 “ by me by bonds and subscribed accounts to her, as executrix
 “ to her said deceased husband, and in ane decret obtained
 “ by her as executrix foresaid, against me, before the commissary of Moray, upon the 19th day of March 1709 years; and,
 “ upon payment, receive the said decret, with the haill grounds
 “ and warrants whereupon the same proceeded; and what other diligence has followed thereupon, make punctual payment of the above sum, I having got allowance of what I
 formerly

“ formerly paid to herself or deceased husband ; and thir pre-
 “ sents, with her discharge of the foresaid decreet, *shall oblige*
 “ *me to hold full count and reckoning to you both.* Make plea-
 “ sant payment and oblige, gentlemen, your humble servant,
 “ JOHN CUTHBERT.

The next article mentioned in the report, is a sum of L. 700, 8s. 4d. Scots, said to have been paid by Innes and Clark to Sir James Dunbar, being the contents of a bond granted by Plaids as principal, and Sir William Dunbar as cautioner, to James Macintosh merchant in Inverness.

In this case the accountant's opinion is in these words : “ That
 “ it is instructed that Innes and Clark paid this debt ; and that
 “ the article falls to be sustained, notwithstanding the original
 “ bond is anilling at this distance of time.”

It was objected to several small draughts by Plaids upon Robert Innes, one of the trustees, that they were neither accepted nor discharged ; but the accountant was of opinion that the payments were instructed by the draughts being in the trustees hands : but surely, without any indorstation or receipt of payment, they could not be the foundation of an ordinary action for debt.

Receipt by John Cuthbert to Patrick Clark, and what form I draught of the Draught.

I John Cuthbert, son to Mr John Cuthbert sometime clerk of Inverness, grant me to have received from Mr Alexander Clark baillie of Inverness, the sum of twenty shillings money of south Britain, *for which I oblige me to hold count.* In witness, this presents are written and subscribed at Inverness upon the 11th day of June 1713.

Draught by ditto on ditto.

Plaids, February 9. 1715. Sir, Betwixt and the 15th day of May 1710 years, pay to James Duncan merchant in Elgin, or order, the sum of L. 25 Scots money, value due by me to him. Make pleasant payment, *and thus I shall oblige me to hold count to you for the same,* and oblige, Sir, your most humble servant, (Signed) JOHN CUTHBERT. Directed *for Mr Alexander Clark baillie of Inverness.*

N. B. Almost all the other draughts and receipts granted by John Cuthbert to the trustees conclude in the same uniform manner, obliging him to hold count to them for the contents.

January 16. 1771.

UNTO THE RIGHT HONOURABLE,

The Lords of Council and Session,

T H E

P E T I T I O N

O F

ALEXANDER CUTHBERT, Esq;

HUMBLY SHEWETH,

THAT in the question between the petitioner, defender, and Mrs Elisabeth Dunbar, and James Sinclair of Durin, Esq; her husband, for his interest, pursuers, your Lordships, of this date, pronounced the following interlocutor. Nov. 29. 1770
“ On report of Lord Gardenston Ordinary, and having advised informations given in, the Lords find the pursuer accountable for the rents of the lands of West Cannisby for crop 1709, and subsequent years; and remit to the Lord Ordinary to proceed accordingly.”

Against this interlocutor a reclaiming petition was preferred, praying your Lordships to find the pursuer liable for the rents of these lands from the 1694: but that petition your Lordships, of this date, were pleased to refuse.

Dec. 18. 1770

As the petitioner could have no doubt, from the evidence already brought, that the pursuer's authors had intromitted with the rents of these lands from the 1694, a search for him was made amongst sundry old writings; for which the recess, during the

A

Christmas

Christmas vacation, afforded time: and upon that search the petitioner has actually discovered some papers that afford additional convincing evidence of the justice of his demand.

The interlocutors above mentioned are silent as to the rents prior to the 1709. and do not find that the pursuers are not accountable for them: so that the petitioner, on that account, is not foreclosed from bringing them under review. However, supposing that these interlocutors were to have the same effect as if they found expressly, that the pursuer was not accountable for the rents from the 1694, yet still surely it would be competent for the petitioner to bring them under review, in consequence of the exception in the act of sederunt, upon new discoveries in point of fact, or *instrumenta noviter reperta*.

As the petitioner has discovered additional documents in writing, he is persuaded, that his argument upon them, joined with the evidence formerly stated, will be patiently listened to; for the question is of great consequence to him: and it is indisputable, that the pursuers have attempted to take very undue advantages of him, and had well nigh prevailed in such attempts. Thus the pursuer obstinately denied, that her authors had received payment of the large debt due by William Innes; and had not a voucher in writing been luckily and unexpectedly found, the petitioner would have been cut out of it. In the same way, she denied, that her authors had had possession of the lands of Cannisby prior to the 1719, when Alexander Clark disposed to Sir Patrick Dunbar: and upon this false averment she obtained several interlocutors against the petitioner upon this point, both before the Lord Ordinary and your Lordships. But at last, upon searching the repositories of Clerk Campbell, complete evidence was found of the possession of her authors long before; and upon it your Lordships have found her accountable, from the 1709, which is for ten years more than she admitted. It is with no less injustice that she has denied the intromission of her authors with these rents from 1694: and when all circumstances are considered, the petitioner flatters himself he will obtain the same justice, with regard to this point, that he has done with regard to the rest.

Sir James Brochar of Aley being incumbered with debts, his estate was brought to a judicial sale in 1694, when the greatest part of it was purchased by the Earl of Cromarty for behoof of the heir of the family; but as the residue of the estate did not find a purchaser

chafer, what remained unfold was parcelled out, and divided among the creditors, in proportion to their debts.

Alexander Cuthbert, provost of Inverness, being of the number of these creditors, his interest was produced in the ranking; but he happened to die *pendente processu*. His nephew and heir, John Cuthbert of Plaids, was an infant at the time; and Provost Cuthbert's interest was ranked for its proportion of the price of the lands purchased by Lord Cromarty, and the lands of Wester Cannisby allotted to that interest in the division of the unfold lands, not in name of any particular person, but of Provost Cuthbert's representatives in general.

That the tutors or curators of John Cuthbert did not intromit with the rents of these lands, is certain, as will appear from the sequel; and it is admitted, that they did not receive from Lord Cromarty the proportion of the price of the lands purchased by him, for which Provost Cuthbert's representatives were ranked; as that debt was claimed by Mrs Jean Hay, the widow of Cuthbert of Castlehill, upon the late Earl of Cromarty's forfeiture, as a debt affecting that estate; and, however strenuously opposed by his Majesty's Advocate, was affirmed by judgement of this court.

From the tutorial accounts it appears, that the tutor had never attained possession of the lands of Cannisby, nor had any intromission with the rents of these lands. Lord Cromarty retained that part of the price for which the debt due to Provost Cuthbert's representatives had been ranked on his purchase; and as Provost Cuthbert's infant heir was the only person who could have a title to intromit with, or discharge, the rents of Cannisby, these were allowed to remain in the tenants hands, from the 1694, to the 1709: and there will be occasion in the sequel to observe, that several of the tenants, possessors of these land in the 1694, continued in possession of their respective farms down to the 1709, and for several years thereafter, in good credit, and made punctual payment, both of the current rents, and any arrears they were owing: a circumstance hitherto not sufficiently attended to, or explained; but which, in the sequel, the petitioner will have occasion to lay stress upon: and it will not be matter of surprize, that they should have been in good circumstances in the 1709, when they had had the use and enjoyment of so many years rents without paying interest therefor.

John

John Cuthbert of Plaids, the heir and representative of Provost Cuthbert his granduncle, being naturally feeble, weak, and indolent, and in that respect improper to be introlled with the management of his own affairs; and being at the same time incumbered with some debts, for the payment of which provision behoved to be made, was prevailed upon, by deed of this date, to grant a faculty to Robert Innes of Menstrie, and Alexander Clark, one of the bailies of Inverness, whereby he constitute them "his very lawful *attornies, agents, and special friends bearers, for meddling, introducing, and receiving, all debts and sums of money whatsoever, and others, any manner of way due and addebted to him, whether heritable, real, or moveable; particularly, and but precisely of the foresaid generality, the three following articles.*"

1st. What sums were due to him by the Earl of Cromarty and Sir James Sinclair of Mey; alluding to the debt affecting the estate of Mey, and ranked upon the price of that part of the estate which had been purchased by Lord Cromarty. 2^{dly}, What was due by the tenants and possessors of Cannibry; which, your Lordships will observe, could only mean and intend the bygone rents for crop 1708, and proceedings, as it had no relation to the rents of any after years, but alienarily those that were then resting owing by the tenants of Cannibry; and as again expressed in an after clause of the same deed, all sums of money, and others whatsoever, any manner of way due, *resting and intebted to the said John Cuthbert by all and every one of the above-designed debtors and tenants.*

Aug 15 1709. Of the same date, Innes and Clark granted backbond, obliging them, their heirs, executors, and successors, *to make just count, reckoning, and payment, of what sums of money they should happen to receive "from all or any of the above-designed debtors and tenants, by virtue of, and upon, the aforesaid right; deducing always, and allowing in the first place, all and whatsoever debts they should happen to procure right and title to, due by the said John Cuthbert to whatsoever person or persons, with all necessary and contingent charges and expenses that they should happen to deburse, and give out, in the said affair; with a competent salary for their own pains and travel in negotiating and managing his said affairs; thereby declaring, that what debts should be acquired from any of the creditors of the said John Cuthbert, which they should pay and purge by his own effects, any composition which they*

" might

“ might happen to procure upon such payment, the same should truly and effectually redound and be communicate by them to the said John Cuthbert himself, and his forefairs.”

From this backbond, of the tenor above recited, compared with the power of attorney itself, your Lordships will clearly perceive, that as Innes and Clark were not at the time creditors to Plaids in any sum whatever, the right granted to them of levying, intromitting with, and discharging, the several sums generally and particularly therein mentioned, was to the special purpose, that they should apply the same in compounding the debts due by Plaids; the benefit of said compositions to be communicated to him: and that for their trouble in the premisses they were to receive a suitable gratification, and that, in consequence of the trust so undertaken, they were bound to do the diligence that was necessary for making these subjects effectual, particularly the arrears of rent due by the tenants of Cannisby, which had already lain too long in the tenants hands, and were most likely to suffer by any further delay or neglect, cannot admit of a question.

Innes and Clark do not however appear to have ever seriously intended the fair execution of the trust they had thus undertaken. Their private affairs were then *derangé*, and a sum of money was what they had immediate occasion for. In this view, as the three subjects particularly above mentioned were most likely to answer that end, or to be a fund of credit, they easily persuaded the poor weak man to execute an assignment of the premisses in their favour.

Accordingly, by deed of this date, proceeding upon a false and affected narrative of its being granted for onerous causes, Plaids sold, disposed, and assigned, to them, their heirs, &c. the apprisings which he had against the estate of Mey, with all right, title, or interest, he or his predecessors had thereto; and particularly, but prejudice of the foresaid generality, any share, part, or portion, of the said estate of Mey, allocate and set apart for the said John Cuthbert by the Lords of Council and Session in the decret of sale of the same, passed in the year 169 , and the security given therefor by George Earl of Cromarty, or *whoever else was the purchaser*, principal, annualrents, and penalties, therein contained, with the lands of Easter (by mistake for Wester) Cannisby, in the shire of Caithness, also destinate by the said Lords for a part of

Oct. 21. 1709.

B .

the

the payment of the sums contained in the foresaid appraisings, with the mails and duties thereof, bygone and to come.

This deed, of the tenor above mentioned, clearly shows how ignorant the poor weak man was of his own rights; but what is chiefly to be attended to is, the enlargement thereby made of the right formerly granted to these trustees, particularly in the article of the rents of Cannibby, which, instead of being limited as by the former deed to the bygone rents then due, was, by the other deed, extended both to the *bygone mails and duties*, and those to come, without any limitation in point of time.

But this also was qualified by another backbond of the same date; whereby, upon a recital, that the same was only a trust put upon them by the said John Cuthbert, *in order to satisfy and pay his debts, and manage his estate, upon the terms and conditions under written*, they bound and obliged them, their heirs, &c. *to make just count, reckoning, and payment, to the said John Cuthbert, his heirs, &c. of any sum or sums of money, which they, or any of them, should receive from any person by virtue of the disposition and right before mentioned; provided, that out of the first and readiest of any sums of money arising, or to be received, they are allowed to retain in their own hands as much thereof, as will completely satisfy and pay them all and every debt and sums of money due by the said John Cuthbert, already satisfied and cleared by them, or which they should have satisfied and cleared thereafter, conform to the rights of the said debts, to be granted by his creditors to them; and likewise for all sums advanced, or to be advanced, to John Cuthbert himself, or to be expended in recovering and making effectual the subjects disposed, and for their personal charges, and a competent salary for their own pains.* And by this backbond the trustees became further bound *to bring the subject of the foresaid appraising against the said estate of Alex. Smith with what ensued thereupon, to a period and conclusion, by a friendly agreement with the Earl of Cromarty, betwixt the date thereof and the day of 1715; or else, if the said Robert James and Alexander Clark could not agree thereon, to intent a legal process against all parties concerned, and prosecute and follow forth the same until the final end thereof.*

From which your Lordships will perceive, that as the bygone mails and duties of the lands of Cannibby, as well as those to come, were one of the special subjects thereby assigned in trust to James and Clark, to be applied for compounding the debts due by

Plaids,

Plaids, they not only undertook to do the proper diligence for making these, and the other subjects of the apprisings against the estate of Mey, effectual within a limited time, but stipulated payment of a competent salary for their pains and trouble, and payment of their personal charges.

But as this deed was deemed so far defective, as it contained no procuratory of resignation, nor precept of seisin, they took from him, of this date, a third deed ; whereby, after reciting the two former deeds, and that Innes and Clark were desirous to have the afore said subjects more specially transmitted to them, he conveyed to them particularly the afore said apprisings, decret of ranking and sale, sums and lands adjudged to him by that decret, with procuratory of resignation and precept of seisin, and containing an assignation *to the mails and duties for bygones, and in time coming.* And as Plaids had not been infest in any of these subjects, they, of the same date, took from him a bond for 50,000 merks ; and having thereupon charged him to enter heir to his granduncle, the Provost, they, of this date, obtained adjudication of the whole subjects and lands conveyed. Jan. 30. 1710. June 29. 1710.

And of even date with this last-mentioned deed and bond, they granted a third backbond, much of the same tenor with the former ; whereby they acknowledged, that “ albeit the said dispositions, assignation, and bond, do contain and bear the same to be granted for an onerous cause, on receipt of money by the said John Cuthbert, from the said Robert Innes and Alexander Clark ; yet the truth was, the same were granted to them, partly as a security to themselves, *and partly in trust, in order to manage the said John Cuthbert's affairs ;* therefore they bind and oblige them, their heirs, &c. *to make just count, reckoning, and payment, to the said John Cuthbert, his heirs, &c. of any sum or sums of money they, or any of them, should receive from any person, by virtue of the dispositions and bond before mentioned ;*” but qualified, as in the former backbond, that they should be allowed to retain, *out of the first and readiest of any sums of money, or mails and duties, that they shall recover,* as much as will completely satisfy and pay them all debts and sums of money due by the said John Cuthbert, already satisfied and cleared by them, or which they shall satisfy and clear thereafter ; and likewise for all sums, advanced, or to be advanced, to John Cuthbert himself, expences in recovering the subjects disposed, *and for a competent salary for their own pains.* Jan. 30. 1710.

And

And this, as well as the former backbond, contained a proviso, That they shall only be accountable according to their intromissions, and what they shall accept, receive, or take, by virtue of the said rights; but that they shall not be liable for omissions.

Under the authority of these deeds the trustees entered into possession, particularly in levying the rents of the lands of Cannisby, bygone as well as the current-rents; and as your Lordships have already heard, that neither Plaids, nor his tutors or curators, had had any intromission with the rents of these lands from the 1694, the period of Plaids's right to these lands, by the decret of division, which therefore had remained unapplied in the tenants hands, there will be occasion in the sequel to state the proof, that these bygone rents were recovered and made effectual by the trustees, Clark and Innes.

Innes and Clark having thus accomplished their views in obtaining conveyances of the premises, and the rights vested in their persons, they counteracted their trust in the grossest manner, as most of the funds recovered they applied to their own uses, neglected compounding the debts, and suffered the poor man to be thrown in jail: and there has lately been recovered, and herewith produced, the copy of a very clamorous memorial, holograph of Plaids himself, to the Earl of Cromarty, which in the sequel will fall to be more particularly noticed, containing a very lamentable account of his own distress, and of the misconduct of these trustees, with an account subjoined of the funds belonging to him chargeable upon these trustees, particularly the rents of Cannisby from the 1694, and other sums intromitted with by them.

Cuthbert of Castlehill, a near relation of Plaids, and at the same time a considerable creditor, moved with these complaints, was prevailed with to interpose his good offices, partly for securing the debts due to himself, and to rescue the affairs of his friend from out of the hands of these trustees. They had entered into immediate possession of levying the rents of the lands of Cannisby for the crop and year 1709, and bygone arrears, from the 1694 downwards; and in 1710, they had received payment of a debt due by Sinclair of Ulbster, to the amount of about L.2000 Scots, and were not at the time creditors to Plaids in any sum whatever: so that any sum which they advanced to Plaids, or to such of his creditors as they compounded with, were out of their intromissions with his proper funds.

Upon

Upon Castlehill's interposing for the above-mentioned purposes, he, of this date, obtained from Plaids a conveyance to the same subjects which had been before conveyed to Innes and Clark, and to the several backbonds granted by them, qualified by a backbond of even date, declaring the conveyance to be in security of the debts due to him therein particularly mentioned, and obliging him to account for his intromissions after payment of these. June 17. 1713.

In the same year 1713, Castlehill, upon the title of the aforesaid disposition in his favour, brought a process against Innes and Clark to account for their intromissions, and to denude in terms of their backbond; and upon the dependence, he used both inhibition and arrestment. It was frequently renewed and insisted in, particularly in 1732, when it appears to have been revived, both against the trustees themselves, and against Sir Patrick Dunbar and the Earl of Cromarty: and though the same was never brought to a conclusion, full warning was thereby given, both to the trustees themselves, and to Sir Patrick Dunbar, who had come in their place, that they would be obliged to account for their intromissions and management; which therefore was a double tie upon them, not only to have prepared, but also to preserve a regular account of charge and discharge of their intromissions with the proceeds of the trust-subjects, and vouchers thereof.

In 1719, Clark, one of the trustees, became bankrupt; as did Innes, the other trustee, soon thereafter: and as Sir Patrick Dunbar of Northfield was creditor to Clark in relief of certain engagements for him, he, of this date, obtained from Clark, in manifest breach of the trust he had undertaken for Plaids, a conveyance to his share of the several subjects which Plaids had disposed by the several deeds above mentioned in favour of Clark and Innes. Oct. 21. 1719.

This deed proceeds upon a recital of Sir Patrick Dunbar's engagements for Clark; that John Cuthbert had right to several apprisings and adjudications upon the estate of Mey; that he had also a particular decret of sale and preference upon the lands of Cannisby, and was also preferred to the sum of L. of the price of the lands of Cadboll, and others, at the time of the sale of said lands before the Lords of Session, for which the Earl of Cromarty had granted bond to the said John Cuthbert; to all which he the said Alexander Clark had particular rights from the said John Cuthbert; therefore, and for implement of his obligation to Sir Patrick Dunbar, and for his security and relief, he there-

by assigned and disposed to Sir Patrick the aforesaid apprisings and adjudications, and sums therein contained, to which the said John Cuthbert had right, together with the foresaid decreet of sale and preference, and particularly said lands of Cannisby, and the sums of

whereto he the said John Cuthbert was preferred out of the price of said lands, with the bond granted therefor by the Earl of Granary. It contains a special assignation to the whole writs and evidents, and more particularly to the mails, farms, and dums, *of the said lands of Cannisby*, from and after the term of Whitsunday last past 1719; which the petitioner will be allowed to consider as one pregnant evidence, that the arrears of rent due by the tenants of these lands had before this time been received by Innes and Clark, as, upon supposition that any such arrears had been telling owing, it is impossible to imagine, that when Clark was conveying his whole right to these lands in favour of Sir Patrick Dunbar, he would have withheld, or that Sir Patrick would have consented to his retaining, the arrears due by the tenants of these lands, several of whom, as already observed, were the identical persons who had possessed these farms from the 1694 downwards.

Innes, the other trustee, dying soon thereafter bankrupt and insolvent, Sir Patrick Dunbar, as in the right of Clark, was deemed executor creditor to him, and took decreet *exequiuncie contra* against Innes's son and heir-apparent; and upon Sir Patrick's death, his daughter Mrs Elizabeth Dunbar, in virtue of a general disposition from him, confirmed the sums in the foresaid decreet *exequiuncie contra*, and thereupon took decreet of adjudication of Innes's half of the whole subjects that Plaid's had disposed to him and Clark.

Cuthbert granted a general disposition to his wife Mrs Jean Hay, for behoof of herself and children; whereupon she obtained an adjudication in implement against Cuthbert's heir, of all the subjects to which he had right, particularly the lands of West Cannisby, and summe which Plaid's was preferred in the ranking of the creditors of Hay by the decree judge; and she thereafter acquired from the daughter and son of Cuthbert of Plaid's, a disposition of all lands, houses, and other rights, which had belonged to her father, and a confirmation of all rights and deeds granted by Plaid's to Cuthbert.

And as by means thereof she came in Plaid's place, both as to the lands of Cannisby, which had been decreed to Provost Cuthbert's

bert's representatives by the decret of division 1694, and to the debt due by the Earl of Cromarty to Provost Cuthbert's heirs, as his proportion of the price of the lands purchased by the Earl ; so she had right to the several backbonds granted by Innes and Clark ; and as Sir Patrick Dunbar, as in right of Innes and Clark, for security and relief of the debts due by them to him, could be in no better case than his authors, she was intitled to call upon them to render an account of charge and discharge of their own and authors intromissions with the trust-subjects, in extinction of the debts due by Plaids, to which they had acquired right, and to the benefit of any compositions got in transacting the debts, that being the special purpose for which the subjects had been conveyed to them.

Matters thus standing, Mrs Jean Hay, the petitioner's mother, in whose place he now stands, entered her claim upon the forfeited estate of Cromarty, for the debt due to Plaids, as ascertained by the decret of ranking and sale in 1694 ; in which, however strenuously contested on the part of his Majesty's Advocate, she met with no opposition from Sir Patrick Dunbar : but after she had prevailed in having the claim affirmed, after a troublesome and expensive litigation, Mrs Elisabeth Dunbar, and Sinclair of Duren her husband, for his interest, as in right of Sir Patrick her father, brought the present process, concluding to have it found and declared, That she had the preferable right to the aforesaid debt upon the estate of Cromarty, in payment and satisfaction of the debt said to be still due by Plaids to Innes and Clark.

It is unnecessary, upon this occasion, to trouble your Lordships with a minute recital of the various points that came to be disputed in the litigation which thereupon ensued ; let it suffice to observe, that it was at length finally ascertained, by repeated judgements of this court, that the petitioner was not obliged to denude of the debt upon the estate of Cromarty, further than as the pursuer should instruct Innes and Clark to be still creditors of Plaids.

This point being fixed, and the process thereby resolving in a count and reckoning ; as it was incumbent upon the pursuers, by the regulations of court, and from the nature of their own and their authors rights, to exhibit an account of charge and discharge of their own and their authors intromissions, the Lord Ordinary made repeated orders for that purpose ; which, after long evasion,

at

at length produced a sham account and confederence of the debts said to be due by Plaids to Innes and Clark; but without giving any credit for their intromissions with any of the proceeds of the trust-subjects, of which, being singular successors, they pretended to be totally ignorant, and to have no knowledge of their authors intromissions, particularly the rents of the lands of Cannisby prior to the 1719, when Sir Patrick Dunbar entered into possession of these lands, upon the right acquired from Clark. This, however, produced a remit to an accountant; who made his report, stating sundry points for the Lord Ordinary's opinion, particularly with respect to the period from which the pursuer should be accountable for the rents of the lands of Cannisby, viz. Whether from the 1694, when, by the decret of division, Plaids's right to the mails and duties of these lands took place; or, 2^{dly}. From the 1709, the date of the trust-assignment to Innes and Clark; or, 3^{dly}. From 1719, when Sir Patrick Dunbar confessedly attained the possession upon the right attained from Clark.

The pursuer repeatedly denied, that either her father Sir Patrick Dunbar, or any of the original trustees, in whose right she stands, had had any intromission with the rents of Cannisby sooner than the year 1719; and therefore contended, That she could not be accountable for the rents from an earlier period.

It was on the other hand contended for the petitioner, That as the original trustees, the pursuers authors, were assigned to the decret of ranking and division 1694, with all that had followed thereon, particularly to the bygone rents of the lands of Cannisby from the 1694, they must be presumed to have intromitted with the rents of these lands, and with all the subsequent rents from the 1709 to the 1719, unless they could alledge and show, that they had been debarred therefrom, or that other persons had intromitted therewith; or that the same could not be recovered or made effectual.

July 14 1765 But the Lord Ordinary, by interlocutor of this date, was pleased to find, " That the pursuers are only obliged to account for the rents of the lands of Cannisby from Whitsunday 1719, in respect the defender offers no proof of an earlier possession by Innes and Clark the original trustees, and shows no sufficient cause for resting upon bare presumptions of an earlier possession;" and to
 Jan. 23 1766 which your Lordships adhered, by interlocutor of this date.

But

But as these interlocutors were founded singly upon this ground, That the presumptions of an earlier possession, unsupported by any proof, were not *per se* sufficient to make the pursuer accountable for the rent of these lands prior to Whitsunday 1719, the petitioner, in the after proceedings before the Lord Ordinary, demanded, and was allowed a proof of Innes and Clark's intromissions with the rents of these lands prior to Whitsunday 1719; and such proof as could then be had, being accordingly taken, and reported to the Lord Ordinary, his Lordship, by interlocutor of this date, found, That the defender has not brought any sufficient evidence to prove or instruct, that Innes and Clark had possession of the lands of Wester Cannisby prior to their disposition in favour of Sir Patrick Dunbar, in 1719. July 7. 1769.

This interlocutor was submitted to your Lordships review, upon the evidence then in process; but upon supposition of your Lordships being of opinion with the Lord Ordinary, that these were not sufficient to instruct Innes and Clark's intromissions with these rents prior to the 1719, he prayed warrant from your Lordships, for searching the repositories and papers of the deceased William Campbell, the sheriff-clerk of Inverness, who had been factor for Innes and Clark, and levied the rents for them of these lands of Wester Cannisby; as also for recovering the account-books and other writings of the deceased Alexander Fraser, relative to his intromissions with the rents of said lands prior to said period: and accordingly your Lordships, by interlocutor of this date, adhered Feb. 15. 1770. to the Lord Ordinary's interlocutor: but remitted to his Lordship, to grant warrant for inspection of William Campbell's papers; and to transmit to the clerk of this process what writings shall be found relative to Clerk Campbell's intromissions prior to said year 1719; and for recovering the account-books and other writings of Alexander Fraser, relative to his intromissions, with the rents of these lands; and to hear parties procurators upon what further the petitioner condescends upon, and offers to prove, relative to the intromissions of Innes and Clark with said rents.

In consequence of these interlocutors, a number of material papers were recovered from the repositories of Clerk Campbell; particularly a continued train of letters from Alexander Clark, to the said William Campbell, from the 3d April 1711, to the 19th October 1714; and a number of accounts and jottings, mostly of the hand-writing of the said William Campbell himself, or of his son

James, authenticated by William ; with all which the Lord Ordinary made avifandum. And as from these there appeared the most complete and undeniable evidence, of Clark and Innes having entered into possession, by levying the rents of crop and year 1709, that is, immediately upon their getting the assignment from Prinds, your Lordships, of this date, pronounced the following interlocutor. " On report of the Lord Gardenston Ordinary, and having " advised informations given in, the Lords find the pursuers ac- " countable for the rents of the lands of Well Cannisby, for crop " 1709, and subsequent years ; and remit to the Lord Ordinary to " proceed accordingly."

And as this interlocutor was acquiesced in by the pursuers, it is proper to observe, that your Lordships did not require positive evidence of Innes and Clark's having intromitted with the whole of these rents, of all and each of the aforesaid years, from the 1709 to the 1719. It was held to be sufficient, that their intromission appeared to have begun as early as the crop 1709, that is, as early as in the nature of things it could be, and that their intromissions appear to have continued for the subsequent years. 2^dly, It shows how little regard was due to the pursuer's bold and positive averments, that her authors had had no intromission with the rents of these lands prior to Innes and Clark's assignment to her father Sir Patrick Dunbar in 1719. The like denial had been made of the payment they had received of the great debt due by Ulbster, and which the petitioner was likely to be cut out of, for want of proof of the actual payment, when discovery was most accidentally made of the discharge which Clark and Innes had granted of that very debt.

The aforesaid interlocutor had gone so far, as to find the pursuers accountable for the rent of the lands of Cannisby for crop 1709 and subsequent years ; and the petitioner does not mean to deny, that in the view which your Lordships had then conceived of the proof, you seemed to be of opinion, that there was not sufficient evidence to render the pursuers accountable for the rents of former years, as supposing them also to have been intromitted with by Innes and Clark : but as the judgement went no further than to find them accountable for the rent crop 1709, and subsequent years, and was altogether silent as to former years rent, a petition was presented, in name of the now petitioner ; whereby, *inter alia*, he prayed, That the pursuer should be accountable for the rents

of the lands of Wester Cannisby from the 1694 to the 1709; but which your Lordships were pleased to refuse, by interlocutor of this date.

Dec. 18. 1770

As the petitioner does not conceive himself to be foreclosed by the interlocutor last above mentioned, from submitting this point to your Lordships review; and this the rather, that upon a more exact scrutiny into some of the papers of Plaids that happened to come into his hands during the late recess, discovery was made of a holograph copy of John Cuthbert's information to the Earl of Cromarty in 1714, complaining loudly of the misconduct of the trustees, and referring to a general state or abstract of the trustees intromissions with the proceeds of the trust estate; and as this strongly connects with the other proofs of the whole taken together, and furnishes either complete legal evidence, or sufficient presumptive evidence, that *de facto* the trustees levied the rents from 1694 to 1709; your Lordships will not be unwilling to lend a favourable ear to what shall now be offered, upon a complex view of the whole case, for evidence that these trustees did *de facto* intromit with the rents from 1694 to 1709.

And if the petitioner rightly understands the grounds upon which your Lordships last interlocutor proceeded, it rested upon the improbability that the rents of these lands for so many years would have been allowed to run in arrear; or that, supposing them to have been in arrear for so many years, they should all have been made effectual.

But to this the petitioner opposes a much more pregnant presumption, and to which your Lordships particular attention is humbly requested, viz. That as these lands of Cannisby, from the duplicates of the accounts recovered from amongst the papers of William Campbell, the factor under Innes and Clark, appear to have been generally possessed by five tenants; sometimes, though but rarely, six; so it appears from these very accounts, compared with the rental in the process of sale of the estate of Mey 1694, that three of the tenants possessors of these lands in 1694 continued to be tenants therein in 1709, when Innes and Clark entered into possession, and for several years thereafter, viz. Patrick Swannie, Donald Williamson, and William Dunnet: and as there will be occasion in the sequel to observe, that these three tenants were not only continued in possession of their

their respective farms for several years thereafter, but made regular payment of their current rents, and of any rents, old or new, which they were owing; this of itself must furnish convincing evidence of the trustees having recovered payment of the rents due preceding the 1709; as it is impossible to believe, that these trustees, even for their own sake, independent of the duty they owed to Plaids, would have continued these tenants in possession of their several farms, if they had been owing so great an arrear of rent, which they were unable to pay up, or would have taken payment of the rents of the latter years, leaving those of the former years unpaid.

And when this fact, as in the sequel to be established from the accounts and letters in process, shall be joined to the various other facts and circumstances tending to establish this general proposition, shall be taken under consideration in one complex view, the petitioner will be pardoned to say, that it puts the matter out of all doubt.

And though your Lordships were pleased to be of opinion, that the presumptions formerly stated, if taken by themselves, were not sufficient to oblige the pursuers to hold count for the rents of these years from the 1694 to the 1709, he is not precluded from founding upon these, as co operating with the other facts and circumstances for evidence of the pursuer's authors intromission with the rents of these former years.

The petitioner will readily admit, in any common case, the improbability that so many years rents should be allowed to remain in the tenants hands; though instances are not wanting, where even this has happened from various accidents; but which, in the present case, is easily accounted for, from its peculiar circumstances, which have been already noticed.

These lands of Wester Canulloch, in the sale of the estate of Mey, had been adjudged to Provoll Cuthbert's representatives after the Provoll's death, without specifying who these representatives were. Plaids, who was the Provoll's grandnephew and heir, was an infant at the time. His tutor, it is certain, gave no attention to his interest in the lands; for it appears from a decree of exoneration obtained by him on his intromissions, that though he charged himself with a variety of other intromissions, no mention is made of the lands of Canulloch. Plaids afterwards impowered James of Maudslaw, one of his trustees, to call his curators to an account for their intromissions. And he accordingly brought a process

cess against them in 1713; in which he charges them with the rents of the lands and houses in Inverness, and other subjects, which they actually possessed; but does not charge them with intromitting with the rents of Cannisby.

Sir James Sinclair of Mey was denuded of these lands by the judicial sale, and decret of division; so that he had plainly no title to resume the possession, or intromit with the rents: and there will be occasion in the sequel to observe, that although Mey seems to have had an intromission with the teinds, of which it is said he had then a current tack from the parson of Cannisby, which expired about the 1708, when the minister obtained a decret of augmentation and locality, he, from that time, ceased to have any further intromission even with the teinds. But supposing it were true that Mey had, without any title, some intromissions with these lands, that would not in the least vary the argument: for it is clear that he would never tortiously keep possession of them after the year 1698, when the estate in Caithness was re-disposed to him by my Lord Cromarty, as from that period at least Mey was extremely desirous to carry the plan of the decret of sale and division into execution, being the sole means by which his estate was preserved to him. And if he should, without any title, have had some intromissions before that period, as he was well able to repeat them, so there can be no doubt but Innes and Clark obliged him to do so: for it appears, from a messenger's receipt to William Campbell, their factor, that a summons was execute against Mey; and, from the signet-book, that such summons was taken out upon the 11th November 1710: and besides the evidence arising from the circumstance of this summons never having been called, or insisted in, that Mey accounted for any intromissions he might have had, as the tenants, though they should have made payment to Mey *sine titulo*, would not thereby be discharged at the hands of the proprietor; it is obvious, from their being afterwards continued in possession by the trustees, and counted with for bygone rents, as well as their current rents, that all these bygones were paid up to the trustees.

And as no other person can be condescended upon who had even the pretence of title to possess, it will never be presumed, that the rents were levied by persons who had not the vestige of a title: and it is therefore a plain consequence, that they must have remained in the hands of the tenants, unuplifted by any per-

for whatever, till the 1709, when Innes and Clark took the conveyance from Plaids.

And as these specialities well accounts for the seeming improbability, that so many years rents should have remained in the tenants hands, it is fully more improbable, that in so special a case there should not have been any arrears of rent whatsoever due by the tenants of these lands when Innes and Clark stepped into possession, or that, if there were any arrears of rent then due, they should have confined their intromissions to the rents of that immediate crop, neglecting all the arrears; for that must be supposed, if the pursuers are now found accountable only for the rents crop 1709.

But what seems to put it beyond all doubt, that there was certain bygone rents then due, is, that in all the three deeds above mentioned taken from Plaids, the last of these at the distance of near six months, Innes and Clark are specially assigned, not only to the current rents, but also to *bygones*: a plain confession, that there were certain bygone rents then due in the tenants hands. That Innes and Clark were disturbed in the possession, or that any other person had a promiscuous intromission, is not so much as alledged; and being equally assigned to the bygone, as well as to the current and future rents of these lands, it is incredible that they would confine their intromissions to the current and future rents *only*, neglecting the arrears, when they had equal right to both.

By the several backbonds, they were specially bound *to account for their intromissions*; and particularly to bring the *subject of the appraisings against the estate of Mey* to a period, betwixt and the end of the 1710, or to follow forth a process against all concerned. So that, as well from the nature of the trust they had undertaken, whereby the rents and other subjects were to be applied in compounding Plaids's debt, as from the aforesaid express obligation, they were bound, not only to proceed immediately to take all necessary measures for making the subjects effectual, but also to keep regular accounts of their intromissions; without which it was impossible for them to render a fair and just account. This proposition is so clearly founded in the principles of law, justice, and common sense, that it is impossible it can be disputed; and the consequence of their not keeping any accounts, must be, to preclude their intromissions with the bygone arrears, as well as with the current rents, unless it could be alledged, that some part of these had been lost by the insolvency of the tenants; which, in the sequel, shall be shown was not the case.

Nor will it vary the argument, that the question is not here with the trustees themselves, but with the heir of Sir Patrick Dunbar, the assignee of Clark. It has been already observed, that Sir Patrick Dunbar's right was no other than an assignment from Clark to his share of the subjects trusted in security of debt which Clark owed him; and the patched-up title which he, and the pursuer, his daughter, lately made up to Innes's share, upon pretence of Clark's being creditor to Innes in the management of the trust, makes it manifest, that neither of them could be ignorant, that Clark and Innes were but trustees in the right which they had taken from Plaids, and that they were bound to denude, upon payment of the debts due by Plaids, to which they had acquired right; that is, in other words, that the rights were extinguishable by intromissions; and consequently, that they, as coming in the place of Innes and Clark, were accountable both for their own and their authors intromissions.

It might merit a different consideration, was the petitioner endeavouring to raise up a claim of debt against the pursuers, for the supposed amount of their own and authors intromissions, over and above their payments and disbursements under the trust: but when the question is, Whether or not these payments and disbursements were extinguished by their intromissions? the argument points strongly the other way: That as their authors had an universal possession, and intromission with the rents, and no other person interfering therein, they must be presumed to have intromitted with the whole rents, the by-gones as well as the current rents, where they were equally assigned to both, and cannot say that any part was lost by the insolvency of the debtors; and this the rather, as in the sequel shall be shown, that at least one half of the identical tenants who possessed these lands in the 1694, continued in possession in the 1709, and for several years thereafter, and made punctual payment of the rents.

And to these the petitioner will be allowed to add that additional piece of evidence which has been discovered since pronouncing the last interlocutor, viz. a double of the information, holograph of Plaids, transmitted by him to the Earl of Cromarty in 1714, containing grievous complaints of the infidelity and maltreatment of these trustees; having thereto subjoined a state of accounts of the sums chargeable upon these trustees, and of their intromissions therewith; wherein, amongst other particulars, they are charged

as having intromitted with the bygone rents of these lands for seventeen years, including the rent 1710, that is, from the 1694 downwards, and with the four years rent from Martinmas 1710 to the 1714; which therefore is demonstration, that the rents of these years were not only understood to be due by the tenants, but that Innes and Clark, in virtue of their assignments, had right to these arrears, and had actually recovered payment of them from the tenants. This information and state is hereto annexed; and it will be observed, that every one article that Plaids charges his trustees to have intromitted with, though obstinately contested, have been now determined against them by your Lordships, excepting this one of the rents of the lands from the 1694; as also, that he charges his trustees with those sums only with which he was certain they had intromitted, leaving blank such articles falling under the trust-right as was illiquid and unascertained of themselves, or as to which he was not certain of the trustees intromission, such as the value of the lands of West Cannisby, his wife's tocher, and the debt due by the Earl of Cromarty.

And that *de facto* they had received payment of these, is what the petitioner now proceeds further to establish, from the letters of correspondence and accounts, recovered upon the last diligence and search made into the writings of William Campbell, the factor employed by Innes and Clark to levy the rents of these lands for their behoof.

It has been already observed, that the whole of these lands were possessed by five or six tenants; and that three of these, viz. Patrick Swannie, Donald Williamson, and William Dunnet, were tenants and possessors in 1694, and continued in possession of their respective farms in the 1700, when Innes and Clark entered into possession, and for several years thereafter.

That they were tenants in the 1694, appears from the decret of sale and division; that they continued in possession in the 1700, and for several years thereafter, appears from the accounts kept by Campbell the factor, of the rents of the subsequent years, recovered from amongst Campbell the factor's papers, upon the warrant granted by your Lordships. And it is submitted to your Lordships, if it is possible to believe, that these very tenants would have been continued for so many years, after that Innes and Clark had entered into the possession, without paying up their former arrears, to which Innes and Clark were specially assigned; or that payment would

would have been accepted from them, of the current rents of these after years, and the bygone arrears allowed to remain in their hands.

Your Lordships are possessed of the letters by Clark to Campbell the factor, and of the accounts recovered from amongst Campbell the factor's papers, mostly holograph of himself, or of the handwriting of James Campbell his son, and authenticated by him; they are subjoined to the petitioner's information, to which therefore he will be allowed to refer, for proof of the fact above stated, viz. That these three tenants, Patrick Swannie, Donald Williamson, and William Dunnet, who are proved to have been tenants in the 1694, remained tenants in the 1709, and for several years thereafter; and made payment, not only of their current rents, but also of arrears.

Thus in particular it was, that Alexander Clark, by letter of this date, writes to Campbell the factor, in these words. "I agree, May 7. 1711.
" that *Peter Swannie's* son, shall get what Thomas Groat possessed;
" and endeavour, if possible, to cause him take Williamson's possession; for I'll not continue him longer in it." But that this projected alteration of the possession of these tenants did not take place, and that both Peter Swannie and Williamson were continued in possession for subsequent years, appears from the factor's accounts.

And that Clark, as well as Campbell the factor, were equally attentive to recover the bygone arrears and current rents, appears both from Clark's letters to Campbell, and from Campbell's accounts.

Thus it was, that by letter, of this date, Clark writes to Campbell, April 3. 1711.
" You'll get me notice, how long the Laird of Mey drew the teinds. If I mind right, the tenants declared, it was only two years since he gave over drawing them." This clearly establishes these two propositions. 1st, That though Mey had continued to draw the teinds, in right of his tack from the parson of Cannisby, which had escaped the judicial sale of the rest of the estate, wherein deduction was given of one fifth of the rent, in respect he had no right to the teinds, he had had no intromission with the stock, which therefore had remained in the tenants hands. 2^{dly}, That Clark was then intent upon recovering the bygone arrears due by the tenants, and in that view, had been making inquiry, when Mey gave over drawing the teinds.

And in pursuance thereof, it appears from his next letter, of
F this

May 7. 1710. this date, that he had then resolved to send particular instructions to the factor to prosecute the tenants for the bygone rents. His words are, "I'll send you instructions against the 1st of June, for *prosecuting the bygone rents*; and as to the present farms, I, by these, assign the same to you at the country-price."

The factor's accounts, recovered amongst the factor's papers by warrant of this court, begin at p. 4. of the Appendix to the petitioner's Information, subjoined to Clark's letters; and as he there charges the rents 1712, 1713, 1714, and 1715, and the payments that have been made out of these, the last article of discharge is in these words:

By rents of rents due by the tenants, as per particular ac-	B.	s.	d.	Money.
count,	99	0	0	L. 75 10 0

The particular account referred to in this article, is not to be found; but the arrears here stated clearly shows, that this was the only arrear then due upon that estate, and consequently must comprehend the arrears preceding the 1709.

In p. 6. there is stated a clearance of the hand-writing of James Campbell the factor's son, and the tenants of this estate, beginning with Peter Swannie, one of the tenants who had possessed from the 1694 downwards, respecting his rent 1712, 1713, 1714, 1715, and 1716, subjoined to which the arrears that he owed are thus stated.

	B.	s.	d.	L.	s.	d.
Farm cropt 1715, is	7	2	0	0		
Farm cropt 1716, is	7	2	0	0	9	4
Farm cropt 1717, is	7	2	0	0	9	4
	22	2	0	0	18	8
Deduce, as alledged paid to my father last clearance,	7	2	0	0		
Remains,	15	0	0	0		

The next account in same clearance is with Donald Williamson, another of these tenants, who had likewise possessed from the 1694 downwards, which proceeds thus:

Donald Williamson labours 3 fdm for Martinmas 1712, 1713, 1714, 1715, and 1716; and pays L. 11, 1s. money, and nine bolls victual: He rests only Martinmas debt 1715, and *thirteen bolls old rests*, and the farm 1715 and 1716, allowing what he paid to the minister.

	B.	s.	d.		l.	s.	d.
Old rests,	13	0	0	Martinmas debt 1715,	11	1	0
Farm 1715,	9	0	0	Martinmas debt 1716,	11	1	0
Farm 1716,	9	0	0	Martinmas debt 1718,	11	1	0
	31	0	0				
Got from him to sow Donald				Deduce Martinmas 1715, paid,	33	3	0
Layel's land,	1	3	0		11	1	0
	29	1	0		22	2	0

From which your Lordships will observe, that in stating the arrears due by this tenant, there is an article of old rests, in contradistinction to the arrears of later years; the plain import of which is an acknowledgement, that he had paid up all his old arrears, excepting the price of 13 bolls; and shews, that these old arrears were of an ancient date, and kept a separate and distinct charge against the tenants from that of late arrears, and that they were allowed to pay and discharge themselves of these old arrears at different times, and by degrees.

The next account in the same clearance, is that of Thomas Dunnet, for the years 1712, 1713, 1714, and 1715, where in the like articles of arrears due by him are stated, particularly one article of old rests of 1 firloft 2 pecks.

The fourth account in same clearance is with the widow of Matthew Dunnet, another of these tenants, wherein the particular arrears due by her husband are charged, and amongst these an article of *old rests* of 4 bolls 1 firloft 2 pecks.

The other accounts state the payment made by the different tenants to account both of the victual, money, and casual rent, such as meat, lambs, geese, &c.; and where any of these last were owing, they are particularly stated.

Upon this complex view of the whole case, as these rents from the 1694 to the 1709 were in arrear in the tenants hands when Innes and Clark entered into possession in the 1709; as the factory and conveyances which they took from Plaids, assigned them not only to the rents crop 1709, but also to the bygone arrears; as no other person interfered with them in levying these; as they were in duty bound to have kept regular accounts, charge and discharge, of their intromissions, from which it might appear, whether any,

or

or what of these rents had not been recovered ; as so many of the tenants in the 1694 were in possession in 1709, and were continued in their possession for so many years thereafter, and made regular payments of their rents ; and as, in the clearances made with these tenants, and the accounts themselves kept by the factor, the arrears due by the tenants are regularly stated, and in several of them distinguishing the *old rents* from those of latter years ; as the pursuer will confidently denied any intromissions by Clark and Innes, even for the years intervening between the 1709 and 1719 ; and as your Lordships have, with great justice, found them accountable for the rents 1709, and subsequent years ; and as there is now recovered a holograph state of accounts by Plaids, dated in the 1714, when things were recent and notour, (in which he expressly charges them with the rents from the 1694), it is humbly submitted, whether, from the accumulated proofs as above stated, and referred to, both positive and negative, there is not equal reason, both in law and justice, to find them accountable for the rents from the 1694 downwards. They had equal right to both. It is incredible there should have been no arrears due at Clark and Innes's entry in the 1709. Had they charged themselves with any arrears, it might have founded a presumption, that no greater arrears had been due, or at least that they had received no more ; but when, as your Lordships perceive, not one farthing of these arrears is accounted for, and that Innes and Clark's intromissions with any of the rents prior to the 1719 was so positively denied, and now so clearly proved ; and that from the factor's accounts he is carrying down from year to year the rents due by the tenants of the different farms, distinguishing in some the old arrears of rents from the arrears of latter years, it is humbly submitted, whether the pursuers ought not to be found equally accountable for the whole rents, from the 1694 to the 1709, as well as for those from the 1709 to the 1719.

More especially when your Lordships now have an authentic document under Plaids's hand, when the fact was recent, wherein the trustees are charged with those intromissions, and not the least positing handed down from either of them, importing any thing to the contrary ; so far from it, that the vouchers produced by the pursuers, in support of their charge, uniformly bear

to be to account of their intromissions; and one of Plaids's letters to them, in the 1713, lately recovered, desiring them to compound a debt, concludes, That upon their so doing, he should be obliged *to discount the same to them.* All these documents, joined with the terms of the backbonds, clearly importing, that the trustees should not be in any advance, and only bound to apply *their intromissions*, in the manner, and for the purposes, therein specified, tend strongly to corroborate the account given by Plaids at the time, that their intromissions exceeded the payments and debursments made by them; which is further confirmed by their situation and circumstances, which did not admit of their being in advance.

May it therefore please your Lordships, to find the pursuers accountable for the rents of the foresaid lands of Cannisby from the 1694.

According to justice, &c.

ALEX. LOCKHART.

Double Information sent by John Cuthbert to the Earl of Cromarty, 1714.

Imprimis, Upon the day of years, the above Cuthbert being then in prison at Forres, Mondole and Bailie Clark came to visit him, and, under pretext of friendship, offered their assistance to make an happy end of all his difficulties; for doing of the which, and their security, proposed he should dispoſe in their favours, and that they thereupon, for his security, would grant backbond, obliging them to count and reckon for their intromissions, the matter dispoſed being only trust. Thereafter, when also in prison, that being but ane minute as they called it, they would have ane fuller dispoſition, though in the same terms, and have the former destroyed; which he refused to do, but gave an
G dispoſition,

disposition, and took another backbond off him and thereto. After which, and when lying on sickbed, and as all then thought on death's bed, he having legated, Mr Clark came to Forcibers, where he then was, and told, save the dispositions were founded upon ane certain soun of mony, they could have no access to bring his business to ane period; for which end he proposed once, for the soun of 50,000 merks due be him to them; for which he also took thair backbonds, declaring the same to be trust; as the backbonds themselves, with the double of the dispositions, will declare. After which, finding them not only lazy, but knavish, in their procedures, by refusing him a subsistence, which they were bound to give him to the value of 400 merks annually, he thereupon assigns their backbonds to Castlehill; who registers them, raises horning and inhibition thereon, and executes the same, whereby they stand interpellled. Castlehill, who by his backbond, upon his assignement to him of their backbonds, was obliged to call them to an count and reckoning whether for private interest or bribe cannot be known, hath delayed to do the same; by which delay Cuthbert was put in very bad terms, they endeavouring to reduce him to theirs; but finding that more to exaggerate as trouble, they then bethought he was owing L. 15 to Duff the messenger at Aberdeen; him underhand they moyen to imprison him; which by ane stratagem he went near to do; for he apprehended and carried him to Elgin, kept two days there, and threatened to carry him to Aberdeen, if he did not assign him to Castlehill's backbond, and deliver it to him, for which he proposed his backbond, as itself will declare; which he was compelled to yield to, having no way to satisfy Duff, but to go to prison; which he being invaletudinary, by cough and dysentery, would have cost him his life in all probability. Duff, upon payment of his above soun, with interest and expences, which, as accumulate then, will come to L. 18 or L. 19 Sterling, is obliged to deliver up Castlehill's backbond, or extract thereof, with ane discharge of his debt. But this Mr Cuthbert is no ways able to do while he this stands.

Proposals for Remeidy.

Mr Cuthbert, by his dispositions to Clark and Mondole, have this made himself *mala fide* to act with the Earl of Cromarty, proposes

poses my Lord Cromarty may look out ane man of probity and trust, and least to be suspected, as agent for the E. and him. Mr Cuthbert will assign to Mr Duff his backbond, of which the double is herewith sent: as also will dispone to him the lands in Caithness; will assign him in his *vice* to count with Mondole, and Clark, and Castlehill younger: the double of his charge against them, with ane account of what they have paid for him, is herewith sent. As to the money due by Cromarty himself, he shall, at meeting with the E. show his Lordship what methods are properest to be taken therein; which shall, health serving, be as soon as his Lordship pleases.—All this to be done upon his Lordship's advance of the moitey agreed to be given Cuthbert, and upon security for the moities to be allocat for his daur.

ACCOUNT of Clark and Mondole their intromissions in the money and land interest of John Cuthbert, son to Mr John Cuthbert.

	<i>Libs.</i>	<i>s.</i>	<i>d.</i>
<i>Imprimis</i> , Received from Ulbster, on account of the above John Cuthbert, at Whitfunday 1713,	L.	2879	3 2
<i>Item</i> , From the Earl of Cromarty, of principal,		5154	14 10
<i>Item</i> , Annualrent thereof from Whitfunday 1694 to Whitfunday 1714,		5645	13 4
Sum of this,	L.	13679	11 4

Ane ACCOUNT of their intromissions with the lands of Easter Cannisby.

	<i>Libs.</i>	<i>s.</i>	<i>d.</i>
<i>Imprimis</i> , Of money-rent, L. 56 : 1 : 6, from Whitfunday 1694 to Whitfunday 1710, being 16 years, is		1196	0 0
<i>Item</i> , Of custom-lambs, 12 at 10 d. is L. 6; of custom-geese, 24 at 6 d. per piece, is 7 s. 4 d.; of hen and cock, 120 at 3 d. per piece, is L. 18. All which added, is L. 31, 4 s.; which multiplied by 20, the number of the years, the amount is,		624	0 0
<i>Item</i> , Of victual-rent of 46 bolls 3 firlots 1 lippie, at L. 4 : 3 : 4 <i>communibus annis</i> , for 20 years, is		5902	6 0
This added is,		7722	6 4

Follows

	<i>Libs.</i>	<i>s.</i>	<i>d.</i>
Follows the value of the lands of Easter Cannisby, - -	4000	0	0
Sum of their intromissions, - -	21401	17	8
Sum of alledged paid by Mondole of John Cuthbert his debts, - -	8896	12	2
Sum of what by the above John Cuthbert is denied, not knowing any thing of the contraction thereof, - -	1201	9	0
Which subtracted from Mondole his charge - -	7695	2	0
Which take off of L. 21401 : 17 : 8, remains - -	13796	14	0
This by his wife's provision, which is 1000 marks, with interest since my L. Duffie's death, which was assigned him by contract of marriage, and to which he assigned them.			

CHARGE John Cuthbert *contra* Mondole and Bailie Clark, for the intromissions with his estate, as liable by backbonds.

<i>Impious.</i> Received at Waifsunday 1712 from Ubbler,	-	L. 2879	3	2
At Martinmas 1713 received of money, conform to the fiars, for 36	-			
bolls 1 firlot 6 pecks 1 lippie, for 17 years,	-	3946	1	0
To Martinmas 1714, being 4 years, for the above,	-			
N. B. This article not legible.				
Money rent for 17 years, above yearly L. 56 : 1 : 6 for 17 years, being	-			
to Martinmas 1713,	-	953	10	6
For 4 succeeding years, as above,	-	224	6	0
For customs for the whole years, being 21, as per particular list	-	655	4	0
		<hr/>		
This by what's due by Cromarty,	-	Summa,	L. 9474	17 1

And the value of the lands of Easter Cannisby,
And my wife's tocher.

Sum of what alledged paid by Clark and Mondole, - -	L. 8896	12	2
Sum of what is not, nor intromittible, - -	1379	14	8
Which subtracted from the alledgeance, remains - -	L. 7416	17	4
Which subtract from the above charge, remains free - -	L. 2068	10	9

N. B. The preceding account and information are both quoted on the back by the same hand, as made out in the year 1714, and Plaids died in the 1715.

A N S W E R S

F O R

Mrs. ELIZABETH DUNBAR, lawful daughter, and universal disponee of the deceased Sir Patrick Dunbar of Northfield, and James Sinclair of Duran, her husband, for his interest ;

T O T H E

P E T I T I O N of ALEXANDER CUTHBERT, Esquire.

G E O R G E Viscount of Tarbat, afterwards Earl of Cromarty, having purchased, at a judicial sale, part of the estate ^{July 1694.} which belonged to Sir James Sinclair of Mey, was concerned, by the decret dividing the price, to pay to those having right to two apprisings affecting that estate, led at the instance of ^{Feb. 21st, 1695.} Alexander Cuthbert provost, and Alexander Dunbar merchant in Inverness, the sum of 5154l. 15s. 10d. with that of 331l. both Scots, and interest from Whitfunday 1694, and in time coming, during the not payment.

William Innes, who purchased another part of the estate for behoof of Ulbster, was, in like manner, decerned to pay to the same persons, the sum of 1071l. 12s. 4d. Scots, with interest from Whitfunday 1694.

The rest of the estate in Caithness did not find a purchaser, and, therefore, was divided amongst the creditors; and, by the decret of division, of this date, there was allotted to those having right to ^{Feb. 28th, 1696.} the

the foresaid two appprisings, a small farm, called the lands of West-Cannilby, scarcely yielding 300 merks of yearly rent.

These apprisings were originally led in 1664, at the instance of the said Alexander Cuthbert, and Alexander Dunbar ; but Dunbar having, in 1676, made over his apprising to Alexander Cuthbert, both apprisings came afterwards into the person of the deceased John Cuthbert of Plaids, grand-nephew and heir of the provost.

Plaids came very soon to be reduced to great distress, on account of the debts he owed; and which was greatly occasioned through the mismanagement of his curator, George Cuthbert of Castlehill. In this situation, the deceased Robert Innes of Mondole, and Alexander Clark baillie of Inverness, the last of whom was his relation, interposed their credit for his relief, as well from compassion, as from regard to his deceased father. It appears, that it was by their means that he was saved from rotting in jail, as none of his other friends would advance any thing for his relief; and as they, in this way became considerable creditors to Plaids, and were most justly entitled to be secured of their reimbursements, so it appears that, of this date, the said John Cuthbert of Plaids, in the character of heir served and retoured to the said provost Cuthbert, his grand-uncle, by his factory, for certain *very onerous causes and considerations*, made and constituted the said Robert Innes and Alexander Clark " his very lawful, undoubted, and *irrevocable* factors, " and special errand-bearers, to the effect after mentioned, viz. for " meddling and intromitting with all debts, sums of money whatsoever, and others, any manner of way due and addebted to me, " whether heritable, real, or moveable, by an noble and potent " Earl George Earl of Cromarty, Sir James Sinclair of Mey, and " the tenants and possessors of the lands of Easter-Cannilby, some " time belonging to the said Sir James Sinclair, and for meddling " and intromitting with the sum of 6000 merks, money of North " Britain, of principal, and haill annualrents and expences due " thereupon, contained in a bond of provision, made and granted " by Sir James Dunbar younger of Hempriggs; with full power, " &c."

This deed contains the following clause: "*Likens I bind and oblige me, my heirs, executors, and successors, to deliver up all legal and conventional right and progress which I have of, anent, and* " *concerning*

Aug. 15th,
1709.

" concerning the haill debts due and addebted to me by the fore named
 " debtors ; and, in case any step of the progress be wanting out of
 " my own hand, with power to them to call and pursue for exhi-
 " tion of the same, wherever, or in whose hands the same beis or
 " lies ; and in case of any legal difficulty occur or be proposed a-
 " gainst the validity of these presents, and that the samen is not
 " granted by way of disposition, bearing all clauses necessary and
 " ordinary, omitted *brevitatis causa*, yet nevertheless I, for me and
 " my foresaids, not only dispense with all and every thing that
 " may be proponed or called in the contrary, but also binds and
 " obliges me, and my foresaids, either to denude myself of the
 " haill premisses, in favour of the said Mr. Robert Innes, and the
 " said Mr. Alexander Clark, *omni habili modo*; or, in their option,
 " to deliver them sufficient and most ample discharges and exone-
 " rations, to the haill above named debtors, to be delivered up to
 " them, upon payment to the said Mr. Robert Innes and Mr. Alex-
 " ander Clark, and that how soon I shall be required thereto, and
 " that by advice of men of law and judgment."

It does indeed appear, that Innes and Clark did, of the same date, grant a back-bond to Plaids, obliging them to hold count for their intromissions ; but this back-bond is not produced.

Although the foresaid deed was executed in the form of an irrevocable factory, yet it would appear that it did not take effect, because no writings were then delivered to Innes and Clark, nor were any delivered till January following, when a deed was made out in their favours, in the form of an absolute disposition, as appears from the clause of delivery in that deed. Indeed, it would appear that the foresaid factory must have been returned to Plaids, as the same was never recorded, and the principal factory itself was produced by the petitioner in this process, who no doubt must have found it among the papers of his author, John Cuthbert of Plaids.

Plaids did, of this date, execute a disposition in favours of Innes and Clark, of the apprisings against the estate of Mey ; and, particularly, any share, part, or portion of the said estate of Mey, allocated and set apart for the said John Cuthbert by the Lords of Council and Session, in the decret of sale of the same, past in anno 169 , and the security given therefor by George Earl of Cromarty, or whoever else, in his name, was the purchaser, principal, penalty, and

October 21st,
1709.

and annualrents therein contained; with the lands of Easter-Cannisby, in the shire of Caithness, also destined by the said Lords for a part of the payment of the sums contained in the said apprisings, and mails and duties thereof, bygone and to come; as also, the said John John Cuthbert thereby assigned and transferred to the said Robert Innes and Alexander Clark, the sum of 6000 merks, with the penalty and annualrents, resting by the bond of provision before mentioned, granted by Sir James Dunbar of Hempriggs to Mrs Katharine Sutherland, spouse to the said John Cuthbert.

Jan. 20th,
1710.

As this deed was still considered to be incompleat, the said John Cuthbert, by a disposition, of this date, (which only narrates the last mentioned disposition) did, in further corroboration of the same, and without prejudice thereto, convey to the said Messieurs Innes and Clark particularly, the foresaid two decreets of apprising of the lands of Mey and others, thereby specially adjudged, lying within the shires of Ross and Caithness. This disposition contains an assignation to the mails and duties of the hail lands contained in the apprisings thereby conveyed, *of all years and terms bygone resting unpaid, and yearly and termly in time coming*; as also, a clause of delivery to the disponees of the writs and evidents, relative to the premisses conveyed, conform to an inventory, subscribed by them and the said John Cuthbert: But the foresaid bond of provision for 6000 merks is not mentioned in this deed, either in the dispositive clause, or in the clause respecting the delivery of the writings.

June 20th,
1710.

And, in order the more effectually to vest the subjects, and to compleat titles thereto in the persons of Innes and Clark, it was thought proper that Plaids should at the same time grant them a bond for 50,000 merks, for the purpose of leading an adjudication against himself, on a charge to enter heir to his grand-uncle, provost Cuthbert; which accordingly was done, by decret of adjudication of this date.

These conveyances were *ex facie* absolute and irredeemable; and, therefore, Innes and Clark, by their back-bonds, of even dates with the said two dispositions, became bound to render an account to Plaids, his heirs and assignees, of all sums which they should receive, by virtue of the dispositions and bond before mentioned; but it was thereby specially provided, that, out of the first
and

and readiest of any sums they should recover, they should be allowed to retain in their own hands, as much thereof as would satisfy and pay them all debts and sums of money due by Plaids, or his father or grand-uncle, which they either had already satisfied and cleared, or should thereafter satisfy and clear, with all sums of money which they either had already advanced, or should advance, to Plaids himself, or which they had expended, or should expend, in making the subjects effectual; together with a competent salary, for their pains in paying the said John Cuthbert his debts, and managing his affairs; and they being once fully satisfied and paid of all the said sums, expended and to be expended by them, the overplus, if any, was to be paid by them to Plaids, and his forefairs.

It was further provided, that they should only *be accountable according to their intromissions*, and whatever they should accept, receive, or take, by virtue of the said rights; but that they should not be liable for omissions, and should not be prejudged or limited by the back-bonds, in the power and faculty given them by the fore-said dispositions, of disposing of the subjects disposed at pleasure.

This last mentioned back-bond subsumes, "That, albeit the said disposition and bond do contain and bear the same to be granted for an onerous cause, yet, that the same was granted to the said Robert Innes and Alexander Clark, partly as a security to themselves, and partly in trust, in order to manage the said John Cuthbert's affairs, *upon the terms and conditions underwritten*, &c."

It appears, from the vouchers produced in process, that Innes and Clark had, prior to the date of the last mentioned disposition in January 1710, advanced considerable sums to and for the said John Cuthbert, besides their other engagements for him to his creditors, in order to relieve him from jail.

And the said John Cuthbert, by his declaration and obligation, of this date, reciting, that Innes and Clark had transacted several debts due by him, and accumulate the principals, annualrents, and expences in the bonds and transactions granted by them thereanent; and which accumulate sums bore annualrent from the respective times of their transactions; and subsuming, "That, it being reasonable that the said Robert Innes and Alexander Clark

Dec. 8th,
1709.

“ should be no losers thereby, *especially, seeing the funds made over by me for their relief and repayment, have not yet answered, and will take some time ere they be made effectual*; and it being also reasonable, for the same cause, that such monies as they advance to myself, from time to time in borrowing, should also bear annual-rent, from the several times of advancement thereof;” therefore, he thereby became bound to allow them annualrent for the sums which they had transacted and paid, or should transact and pay for him, as well as for the sums lent, or to be lent by them to him, and that from the time of the advancing thereof.

Innes and Clerk, trusting to the security granted by the foresaid deeds, and expecting they would be able to make the money effectual, proceeded and continued in clearing Plaids’s debts, and they are proved by vouchers produced to have advanced and paid for him sums, which, with the interest from the respective periods of advance, down to this day, will amount to upwards of 2000 l. sterling.

It is obvious that, until the last mentioned disposition in January 1710, when, and no sooner, the writings were delivered over to them, that Innes and Clerk could take no effectual step towards recovering any of the subjects so conveyed to them. And, accordingly, notwithstanding of what is alledged in the petition, they did all in their power to recover the money from the Earl of Cromarty and William Innes; for, of this date, they preferred a petition to the court of Session, praying warrant for registering the bonds for the shares of the price of the estate of Mey purchased by the Earl and Mr. Innes, and falling to the foresaid two ap-
 prisings.

This application was opposed both by the Earl and Mr. Innes; and it was particularly set forth in the answers on the part of the Earl, that he was creditor to John Cuthert, in sums equivalent to what he was preferred to out of the price of the lands purchased by the Earl. And, of this date, the court, upon advising the petition and answers, were pleased to refuse the desire thereof.

Thereafter Innes and Clerk made several attempts to settle matters amicably with his Lordship, and actually entered into a submission with him for that purpose; but as the Earl died in the year 1714, this submission did not take effect. Innes and Clark afterwards attempted to get matters settled with his son John Earl
 of

July 24,
1710.

July 26,
1710.

of Cromarty; but the confusion of his affairs rendered this attempt abortive. However, these steps, although they had not the effect of recovering payment, yet they had the effect of preserving the claim from being lost by prescription; and accordingly they were the only documents of interruption that were afterwards founded upon, in answer to the plea of prescription insisted upon by his Majesty's advocate, in the course of discussing the claim that was entered for these debts upon the forfeited estate of Cromarty, subsequent to the rebellion 1745.

Innes and Clark, of this date, appear, from evidence now produced, to have received from William Innes the sum of 1071 l. 12 s. 4 d. Scots, with interest thereof from Whitfunday 1694, extending in whole to about 2000 l. Scots; but it appears from documents in process, that Innes and Clark had, prior to this period, advanced to and for John Cuthbert, sums amounting to upwards of 5000 l. Scots.

The said George Cuthbert of Castlehill appears to have acted as sole curator for Plaids upon expiry of his pupillarity, which happened in 1696, the year in which the decret of division before mentioned was obtained. As Castlehill never had rendered an account of his intromissions, and his management had been most gross, an action of count and reckoning at Plaids's instance was brought against him before the court of session; but Castlehill, aware of the consequences of the action, and conscious of his maladministration, had the address, previously, of this date, to impetrate from Plaids a discharge of his intromissions, and all demands.

This discharge was procured, and signed at Inches, an obscure place in the country, *remotis arbitris*, and without any friend being present on behalf of Plaids, or even acquainted with the affair. It bears to be written by one Donald Cuthbert, Castlehill's ordinary writer, at Inverness, and witnessed by him and one of Castlehill's servants. It is conceived in most anxious terms, discharging Castlehill in general of all his intromissions of whatever nature, quantity or quality, by bonds, factories, tacks, rights, dispositions, or any other manner of way intromitted with, uplifted and received by him for and in name and behalf of the said John Cuthbert, then his pupil, during his pupillarity, or any time bygone or since, preceeding that date, and of all clags, claims, questions,

questions, controversies, missives, accounts, or any thing else, either of intromissions or omissions, for whatever cause or occasion preceeding that date: and although it is therein said, that several debts had been paid for Plaids, of which therefore the vouchers fell to be delivered up to him, yet no account whatever was instituted, nor were any vouchers delivered up.

Plaids being sensible of the great advances made by Innes and Clark on his account, and of the small sums they had recovered from the subjects conveyed to them, did, of this date, *for their further security, payment and relief to them of the debts, sums of money, and prestations, resting and prestable by him to them*, or wherein they stood bound for him, assign and make over to them the process of count and reckoning before mentioned, at his instance, against George Cuthbert of Castlehill and his other tutors and curators.

The extraordinary discharge above mentioned, which Castlehill had impetrated from Plaids, did not make its appearance for some time; and no wonder he was unwilling to found upon it, considering the manner in which it was obtained. However, after the process of count and reckoning had gone on for some time, it was produced, and of course behoved to be sustained as a good defence in bar of the action.

Castlehill, however, not contented, with the advantage he had thus gained, had also the address to obtain from Plaids, in name of his son John Cuthbert of Castlehill, father of this petitioner, an assignation, of this date, of the foresaid back-bonds granted by Innes and Clark, and to the power thereby given to Plaids of calling him to account for their intromissions.

The cause of this assignation, as appears by Castlehill's back-bond, of even date, is said to be in security and payment, in the first place, of the principal sum of 4200 Scots, and interest alledged to be contained in a bond of corroboration of the date of the foresaid discharge, also then impetrated from Plaids, by and in favours of old Castlehill, and which is excepted from the said discharge; and, in the next place, in security and payment of certain other debts pretended to be due, partly to John Cuthbert of Castlehill himself, and partly to his father George Cuthbert, prior to the date of the mutual discharge.

But

April 29,
1713.

July 17,
1713.

But none of the grounds of debt, for security and payment of which this assignation bears to be granted by Plaids, have been produced in this process by the petitioner; and notwithstanding that old Castlehill, the father, was alive at the time, yet the assignation is taken to John the son, though he has no right in his person to those pretended debts.

Castlehill's right therefore, for any thing that yet appears, seems to have had no just foundation; and the assignation that was lately taken from Plaids's daughter, is a corroborative proof of it. Nor does that assignation mend the matter much, because the woman was extremely poor, of whom her straits rendered it very easy to take the advantage; and the only value pretended to be given for it, was a promise of 50 l. sterling, to be paid after receiving the money from the crown, a consideration by no means adequate to the large sums thereby given away.

Alexander Clark, one of the original disponees, having been nominated executor to the deceased Mr. Robert Frazer advocate, Sir Patrick Dunbar, the respondent's father, became cautioner for him in the confirmation, and he was thereafter decerned particularly by a decret-arbital, standing on record, pronounced by the late Lord Elchies, to pay very considerable sums for Clark on account of that cautionry. Clark therefore did, as he was bound to do, dispose and make over to Sir Patrick Dunbar, his heirs and assignees, the two apprisings aforesaid, and all following thereon, the decret of division and sums thereby due, with the foresaid lands of West Cannisby, and mails and duties thereof from Whitsunday 1719. October 21,
1719.

Thus Sir Patrick Dunbar acquired full right to all the interest which Clark had in the foresaid debt; and as Clark had been obliged to pay for Innes, the other trustee, very large sums, of which he was entitled to relief, these Clark did also, by assignation of the same date, make over to Sir Patrick, on which Sir Patrick obtained himself decerned executor-creditor to Innes before the Commissary of Moray, and having charged Jonathan Innes, eldest son and apparent heir of the said Robert Innes, to enter heir to his father, he obtained a decret *cognitionis causa*; and the respondents, as in the right of Sir Patrick, did afterwards obtain a right of adjudication *contra hereditatem jacentem*. Novemb. 14,
1719.

February 1,
1720.

Sir Patrick Dunbar did, soon after acquiring the right, intimate the same to the Earl of Cromarty, as appears from an instrument of intimation of this date, produced.

Sir Patrick likewise took other steps for recovering the money, and more particularly, in 1733, he entered into a submission with the Earl, to which Castlehill was a party; but the Earl, who had the money to pay, endeavoured, as well as Castlehill, to protract the decision, and the submission at length was allowed to expire. The embarrassed situation of the affairs of the family of Cromarty prevented Sir Patrick from recovering his payment, and the Earl was at length forfeited on account of his accession to the rebellion 1745.

John Cuthbert of Castlehill having acquired right to the backbonds, in manner above mentioned, did, in the year 1713, commence an action against Innes and Clark, to account for their intromissions, in which, however, he did not think proper to insist.

He afterwards, in 1732, after the death of Innes and Clark, and also of Plaids, brought an action against the representatives of Innes and Clark, and Sir Patrick Dunbar, their assignee, for denuding in his favours, and concluding for payment of the rents of the lands of West Cannisby, for the crop and year 1711, and since, and also against the Earl of Cromarty, and the representatives of William Innes, for payment of the shares of the price of these parts of the estates of Mey, severally purchased by them.

This process was called, but never insisted in. However, in the year thereafter, Castlehill became party to the submission already mentioned, betwixt the Earl and Sir Patrick, but upon which no determination followed. However, no new action was ever thereafter brought by Castlehill, which shows that he entertained no good idea of his claim.

After the late Earl's forfeiture, Sir Patrick Dunbar was a very old man, and lived in the remote county of Caithness, his doer, Mr. Ludovick Brodie, was then greatly advanced in years, and, as no notification of the survey of these estates was directed to be made in the publick news-papers, the six months allowed to the creditors for entering their claims expired, before Sir Patrick, or his doer, were apprised of the survey.

However,

However, the deceased Lady Castlehill, the petitioner's cedent, having patched up a title upon a general disposition from John Cuthbert of Castlehill, her husband, entered a claim upon the estate of Cromarty, for the sums above mentioned, and which claim was accordingly sustained.

The petitioner says, that, although the claim for Lady Castlehill was strenuously contested on the part of his Majesty's Advocate, yet she met with no opposition on the part of Sir Patrick Dunbar. But it surely was not Sir Patrick's interest to oppose the claim's being sustained; it was clearly the interest of every person interested in the debt, to co-operate in getting the claim sustained against the crown. At the same time, during the dependence of the claim, Sir Patrick entered a caveat, that his right should be preserved entire, notwithstanding of the claim's being entered by Lady Castlehill, for he being possessed of the writings necessary for supporting the claim, and having been called on a diligence for that effect, Sir Patrick did then assert his right before the Lord Woodhall, ordinary; and his Lordship, by his interlocutor, expressly reserved to Sir Patrick, notwithstanding his producing the rights called for, all right and title which he had to the subject then claimed by Lady Castlehill.

1756.

Lady Castlehill acquiesced in this interlocutor, and proceeded to get her claim sustained; and Sir Patrick was only prevented by death from commencing an action, which he was advised it was proper for him to do, for having it found and declared, by decret of this court, against the said Mrs. Jean Hay, that he had, on the titles aforesaid, the prior and preferable right to the money, with the best and only title to uplift, receive, and discharge the same.

That action, which Sir Patrick himself was prevented from instituting, the respondents brought in 1764, which action came in course before the Lord Gardenston, ordinary, and in which a litigation has been maintained on the part of the defender, which, it is happy, but very rarely occurs in this court. Every possible device that imagination could suggest, has been fallen upon to protract, delay, and embarrass the cause.

The principal defence insisted upon was, that Sir Patrick, and his predecessors and authors, had been satisfied and paid, by intromissions with Plaids's effects. A condescence was thereupon exhibited by the respondents, in which, notwithstanding that they

were

were singular successors, and could not know the intromissions of their authors, or be personally acquainted with transactions, which happened mostly before they were born, they had the candor to acknowledge, that they observed, from the writs in process, that Sir Patrick Dunbar had right, in the year 1719, to the lands of West Cannisby, the rent whereof amounted to about 300 merks, or thereby, and these were all the intromissions of which they had the least information.

There is therefore no solid foundation for the strong allegations in the petition, that the respondents had attempted to take very undue advantages of him, and had well nigh prevailed in such attempts. The above was a full, and the only condescendence, which they could, consistently with truth, exhibit. They could not condescend on, or charge themselves with, or give credit for, intromissions, of which they had never heard; and they had no occasion to know, that the 1071 l. above mentioned, had been recovered by Innes and Clark from William Innes. This sum was an article in the summons, which Castlehill himself raised in the 1732, and, for payment of which, he concluded against William Innes's representatives, after which the respondents could not have the least reason to suspect, that the sum had been uplifted by Innes and Clark; but the moment it appeared to have been paid, they admitted that the sum should be charged against them.

The defender, who affected that she would prove *super intromissions*, was, for this purpose, allowed diligence after diligence, during a dependence of many months: these diligences were again and again renewed, and she examined every mortal, who she suspected, or pretended could give her any information, but without effect. At last memorials were directed to be given in upon the whole cause: the defender would not even comply with this appointment without a plea, and it cost several inrolments before the memorials were forced into process, on which, after some other procedure, the Lord ordinary, of this date, found, " That the pursuer is intitled to insist, that the defender " shall denude in her favour, in so far as the said pursuer shall " instruct, that Innes and Clark were creditors to Plaids, and that " she is not obliged to instruct to what extent Sir Patrick Dunbar was creditor to Innes and Clark, his authors."

The

June 21st,
1765.

Feb. 11th,
1766.

The defender, not satisfied with this interlocutor, disputed the respondents right *in totum*, and presented a reclaiming petition, founding, *inter alia*, on the time above mentioned, limited by the vesting-act, for entering claims on the forfeited estates; and the respondents being advised that their right being prior and preferable to Lady Castlehill's, intitled them to an immediate decret, preferring them to the money; foreseeing, too, the consequences, which, they have since felt, by experience, of entering into any unnecessary litigation with the defender, and aware of the game, which, they believed, would be played against them, preferred a petition on their part, in which they offered to find the best caution, to account for any *overplus* that might be found due out of the fund, after clearing the debt to them.

Your Lordships, on advising these petitions, with answers, were pleased to refuse both, and adhere to the Lord ordinary's interlocutor, with this variation, however, "That the defender, Mrs. Nov. 26, 1766.
" Jean Hay, shall be obliged, before she draw the money in question, to find sufficient caution for paying back, and repeating the same to the pursuer and her husband, or what part thereof they shall be found intitled to, in the event of this process."

On this the cause having returned to the Lord ordinary, the defender, notwithstanding the full account libelled, and produced with the summons, and condescendence already exhibited, insisted, that the respondents should give in another account of what they called, Charge and discharge of their predecessors intromissions, and the respondents, rather than delay the cause, by litigating a matter of little consequence, gave in a second condescendence or account, to which no objections were made by Lady Castlehill; and the whole cause, with the accounts and vouchers, was thereupon remitted by the Lord ordinary to Ludovick Grant, to make up a state of the accounts, and to report his opinion upon the objections and answers thereto.

The defender, however, would not acquiesce even in this remit June 23, 1767.
however harmless, but preferred several representations on most frivolous grounds, which, either with or without answers, were refused; and the report having been made by the accountant, June 15, 1768.
was approved by the Lord ordinary.

From this report, it appeared, that the respondents authors Innes and Clark, advanced and paid to, or on account of, Plaids, sums, now amounting to upwards of 2000 l. sterling ; and the advances made by them was so clearly proved, by vouchers produced, that however well disposed the defender was to dispute every inch with the respondents, yet she could not contest a single article of these advances. All she adventured to do, was to stop the report for some time from being approved, after which she gave in many representations, insisting, that Innes and Clark, and the respondents, fell to be charged with sundry articles, for which credit had not been given Plaids, either in the account or in the report.

These articles, which were four in number, afforded an ample field of litigation, and of which the defender availed herself to the full ; and, although the respondents, from the causes before mentioned, defended themselves at an evident disadvantage, against a person who had lived at the time of the transactions, and was minutely informed of every particular ; yet, as to the first three articles, they were not only totally unsupported upon the part of the defender, but the respondents were lucky enough to disprove them in the clearest manner.

The fourth and last article respected the rents of the lands of West Cannisby, which the defender contended ought to be charged against the respondents authors, as having been intromitted with by them, from the 1694, downwards, but this plea was over-ruled, by repeated interlocutors of the Lord ordinary ; and, particularly, by one of this date, by which he finds, " That, the pursuers are only obliged to account for the rents of the lands of Cannisby, from Whitfunday 1719, in respect the defender offers no proof of an earlier possession by Innes and Clark, the original trustees, and shows no sufficient cause for resting upon *bare presumptions* of an earlier possession."

Against these interlocutors, the defender preferred a reclaiming petition, in which she not only insisted with respect to the rents of West Cannisby, but likewise upon the other articles, one only excepted, which she had not the assurance to introduce into the petition ; and your Lordships, of this date, upon advising the petition and answers, refused the desire of the petition, and adhered to the interlocutors of the Lord ordinary reclaimed against.

It

July 14,
1769.

Jan. 25,
1769.

It is material here to observe, that, by this interlocutor, it was finally adjudged, that no possession or intromission could be made against Innes and Clark, on *presumptions*, but that they were no further liable than for actual intromissions, proved upon them by positive evidence ; and, on this fixed principle, the cause having returned to the Lord ordinary, the defender expressly offered and insisted to be allowed to bring a proof, that they had possessed and intromitted with the rents of the lands of Cannisby from 1694.

A condescendence was accordingly exhibited of the fact, on which a proof was granted. The Lord ordinary pronounced several interlocutors, finding that the defender had not brought any sufficient evidence, to prove or instruct, that Innes and Clark had possession of the lands of West Cannisby, prior to the disposition in favour of Sir Patrick Dunbar in 1719.

These interlocutors the defender brought before your Lordships, in a reclaiming petition, which, upon answers, was, of this date, ^{February 1, 1770.} refused, and your Lordships, at the same time, remitted to the Lord ordinary to grant warrant for inspecting the account-books and papers of the deceased William Campbell, late sheriff-clerk of Caithness, and a diligence for recovering the account-books and other writings of one Alexander Fraser, deceased ; and as the defender insisted for exhibition of certain papers in the hands of David Lothian, the respondent's agent, it was farther remitted to his Lordship, to do therein as he should see cause, as well as to hear parties upon what farther the defender condescends upon, and offers to prove, relative to the intromissions of Innes and Clark with the aforesaid rents, prior to the 1719.

Before the defender had applied for exhibition of the papers in Mr. Lothian's hands, he had already got Mr. Lothian examined upon oath, and Mr. Lothian had deposed that he was not possessed of any papers which could instruct the possession, or intromission of Innes and Clark with the rents of West Cannisby, prior to the 1719. The demand, therefore, that he should exhibit the papers themselves, after having deposed to their contents, appeared plainly intended for delay, however, the respondents rather than litigate any unnecessary point, agreed that Mr. Lothian should exhibit the papers, which he did accordingly ; and it appeared
on

on inspection, that they did not in the least tend to instruct any intromission made by Innes and Clark.

The defender was also allowed warrant and diligence for inspection and recovery of Clerk Campbell's papers, and those of Alexander Fraser; the papers were accordingly inspected, and some serapes were recovered; several witnesses were also examined and the proof, both written and parole, being reported, the Lord ordinary, after memorials were lodged, directed informations to be put in on the import of it; and your Lordships, upon advising thereof, of this date, pronounced the following interlocutor: "On report of the Lord Gardenston, ordinary, and having advised informations given in, the Lords find the pursuers accountable for the rents of the lands of West Cannisby for crop 1709, and subsequent years."

Nov. 29th
1770.

Against this interlocutor, a petition was preferred on behalf of the defender, in which he prayed your Lordships, to find that the respondents were accountable for the rents of the lands of West Cannisby, from the 1694, to the 1709; but this petition your Lordships refused without answers.

The defender has preferred another petition, praying your Lordships to find the petitioners accountable for the rents of the fore-said lands of Cannisby, from the 1694. This petition your Lordships have ordained to be seen and answered, and in obedience thereto, this is humbly offered on behalf of the respondents. And after having fully stated the facts and proceedings, they apprehend that a very short answer will be sufficient to satisfy your Lordships, that the petition falls to be refused, not only upon its merits, but as altogether incompetent.

And, to begin with the last of these, your Lordships will observe, that the fullest explication that could possibly have been demanded, was indulged the petitioner, and that diligence after diligence had been allowed him for recovering every piece of evidence that might be material in the cause. The question was reported by the Lord ordinary upon informations, in which every piece of evidence that was then thought by the petitioner to be of any consequence, was stated; and your Lordships, upon the report, pronounced the interlocutor above recited, of 29th November 1770, finding the respondents accountable for the rents of
West

West Cannisby for crop 1709, and subsequent years; and a petition having been preferred against this interlocutor, the same was refused by the court. The respondents, therefore, do humbly apprehend, that as it is adjudged by two consecutive interlocutors of the court, that the respondents are only accountable for the rents of West Cannisby for crop 1709, and subsequent years, it is not now competent for your Lordships to review these judgments, or to investigate whether they were agreeable to the evidence or not.

The petitioner, in support of the competency of his petition, is pleased to observe, that as the judgment went no further than to find them accountable for the rent, crop 1709, and subsequent years, but was altogether silent as to the rent of former years, that the point, whether the respondents were accountable for the rents prior to the 1709, was still open and entire. And, 2do, The petitioner contended that the petition was competent, in respect that it founded upon evidence arising from writings not formerly laid before the court.

With respect to the first of these, the respondents will be pardoned to say, that it is a mere quibble. It had been established by repeated interlocutors of the Lord ordinary, that the petitioner had brought no sufficient evidence to instruct possession, prior to 1719. This interlocutor was brought under the review of your Lordships, in consequence of which, the cause was remitted to the Lord ordinary to hear parties upon what further proof the petitioner could adduce; and the cause having been taken to report, the petitioner insisted that the respondents were accountable from the 1694, at least, 2do, from the 1710; and your Lordships pronounced the interlocutor above recited, finding the respondents accountable for crop 1709, &c. The plain import of this judgment is, that the respondents were not accountable prior to the 1709. It was found by the Lord ordinary, that the respondents were not accountable prior to the 1719; and these interlocutors must stand as a *res judicata* in favours of the respondent, and be held as the rule of accounting betwixt the parties, unless in so far as varied by the after judgments of your Lordships, and as your Lordships interlocutors only varied the judgments of the Lord ordinary, in so far as respected the rents from 1709 to 1719; so as to the rents preceeding the 1709, the interlocutors of the Lord ordinary must

stand in force in favours of the respondents, and the interlocutor of the court must be held as a judgment in favour of the respondents, as much as if it had declared in express words, that the respondents were not accountable for the rents prior to the 1709.

And that it was considered in this light by your Lordships, appears plainly from what followed, for when the petitioner preferred a petition to your Lordships, praying to find the respondents accountable from 1694 to 1709, your Lordships did simply refuse the petition, and adhere to the former interlocutor, clearly importing that that question was determined by the fore said interlocutor.

As to the *instrumenta noviter reperta*, the respondents do not deny that they were not hitherto founded upon in the course of the action, but they apprehend that that will not be sufficient to render the petition competent, unless the petitioner could alledge that they were writings *noviter venientia ad notitiam*, and which he had no access to know of formerly, whereas it seems to be admitted in the petition, that the writings were found amongst the petitioner's own papers, and which he says he had discovered upon a search which he had made during the Christmas vacation.

This the respondents do humbly submit to your Lordships, is by no means sufficient to render this petition competent, and to intitle your Lordships to review two consecutive judgments of the court upon the same point. It is absolutely necessary for the good of society, and the quiet and security of the lieges, that such forms should be established and observed, that pleas may not be rendered endless. Proofs must necessarily be concluded, and the chequer closed. The petitioner cannot pretend to say that he has been taken short in this case: he was allowed the fullest investigation of the fact, for which end he was allowed repeated diligences, and particularly for the recovery of writings. In making such investigation, it was undoubtedly his duty to have made a full examination of the writings in his own custody: there is no reason to doubt that he did so, and the law will presume it; and after having produced what pieces of evidence he thought material in support of his plea, and has joined issue upon the evidence, and the same has received two consecutive judgments of your Lordships; the respondents do humbly apprehend that the petitioner

tioner cannot be allowed to make a new production of writings in his own hand, and thereupon to oblige the respondents to enter into a new litigation with him, as if every thing was still open and entire.

The petitioner has already maintained in this cause, a litigation which is almost unparalleled in the records of the court, and by which the respondents have been put to a most enormous expence; and if your Lordships shall find this petition now competent, because he has thought proper to produce a few papers which he did not think proper to found upon formerly, the respondents shall despair of ever seeing this cause brought to an end. The respondents do not doubt that he may find among his writings sundry other papers, as much to the purpose as these now produced; and by producing them piece-meal, reclaiming bills may be multiplied, and the cause kept in dependence for many years. This your Lordships justice will never permit. The petitioner has assigned no reason why these writings, if material to the present issue, were not founded upon formerly; and, therefore, he, with submission, cannot be allowed to found upon them now, after the question by the established regulations of the court, has received a final judgment, which cannot be brought under review; and, at any rate, he is humbly persuaded your Lordships will not allow the petitioner to found upon this new production, which, for any thing that appears, might have been produced formerly, without, at least, reimbursing the respondents of all the former expence laid out by them, respecting the present question.

At the same time, was the question still entire, the respondents do humbly apprehend, that this new production can have no influence upon it, but that it stands just where it did, when it was formerly under your Lordships consideration.

This new production consists of three writings; the first is unsigned, without a date, scored in several places, and intitled on the back, "*Double, information sent the Earl of Cromarty, 1714.*" though, in the title prefixed to the copy subjoined to the petition, they have thought proper to make it, "*Double, information sent by John Cuthbert to the Earl of Cromarty.*"

2d, An unsigned scroll, without a date, containing, in one paper, the accounts, copies whereof are subjoined to the petition, intituled, on the back, "*Charge, Cutbbert against Clark and Innes,*"
 " 1714."

[25]

" 1714," and which seems to be of the same hand-writing with the former.

3tio, An unsigned writing, also without a date, intituled, "*Memorandum for Mondole and Baillie Clark*," containing jottings respecting the extent of the victual and money rent of the lands of Cannisby, and the prices of the parts of the estate of Mey, purchased by the Earl of Cromarty and William Innes.

The petitioner says, that the two *first* of these scrolls are holograph of John Cuthbert; but supposing this true, the relevancy of it is not obvious. John Cuthbert's assertion, no more than the assertion of the petitioner in his right, cannot be allowed to establish a claim in his own favours against Innes and Clark.

At the same time, the respondents do deny, that they are holograph of John Cuthbert; and, indeed, it seems to be disproved by a holograph letter of John Cuthbert's, produced in process by the petitioner, and mentioned in the last page of the petition, as upon comparison they appear clearly to be wrote by different hands; and, therefore, when they are neither holograph of him, nor any ways authenticated as coming from him, it is inconceivable to the respondents what stress can be laid upon them.

At the same time, it has been already observed, that, even although they were holograph of him, they can never be held as evidence, in order to create a debt in favours of himself against Innes and Clark. Were the respondents to produce holograph jottings of Innes and Clark (and which they can do) of money paid by them to Plaids, and debts paid for him, but the vouchers whereof are now a missing or mislaid; and to insist, that they should be considered as creditors to Cuthbert for *such* debts, upon *that* evidence, it is believed the petitioners would not listen to it. The respondents would readily be told, that without production of the vouchers *themselves*, the money so paid, could not be allowed them; and, accordingly, your Lordships refused to allow a debt of Plaids, paid to one John Colly, of 153 l. Scots, because the voucher was not now in process, notwithstanding that evidence of its having been paid, had been formerly produced, not only in the submission with Castlehill, but in this process.

Indeed, taking these writings as they stand, the respondents cannot discover, that they can, in the least, aid the petitioner in
the

the present question. As to the first writing, viz. the double information sent the Earl of Cromarty, it makes no mention of Innes and Clark's intromissions, in any shape. Although the paper is conceived in a very clamorous stile, yet it is void of foundation in fact, and the allegations of it are absolutely disproved by the writings and other evidences in process; and it is observable, that it is equally clamorous against Castlehill, the petitioner's own father, who had got an assignation from Plaids to the back-bonds granted by Innes and Clark; and, indeed, Castlehill seems to be the chief object of that complaint. It appears clearly, from the evidence in process, that very considerable sums had been advanced to Plaids, and for his behoof; and it is not improbable that Plaids was provoked that he was not continued to be supplied with money as he wanted it, notwithstanding it is clear, that the bulk of his funds have hitherto not been made effectual.

As to the next paper subjoined to the petition, intituled, "Charge, Cuthbert contra Innes and Clark," if it is to be taken as evidence of Innes and Clark's intromissions with the rents of West Cannisby from the 1694, it must, by the same rule, be sufficient to prove their intromissions with the debt owing by the Earl of Cromarty, which, with the interest thereof to Whitfunday 1714, is therein charged as *received* by them from the Earl. And, indeed, from perusing the accounts, it is evident that it must have been made out very much at random, or that the person who made it out, must have been very ignorant of the real situation of the funds, which were conveyed to Innes and Clark; because, in this account, the money received from William Innes for Ulbster, is stated at 2879 l. whereas even the petitioner himself is forced to admit that it did not exceed 2000 l. Scots.

It would appear from what he calls *proposals for remedy*, that the scheme was to convey the whole to the Earl, or a trustee for his behoof, upon his Lordship's advancing a sum of money to Plaids, and granting security for another sum for behoof of his daughter; and, in the view of making the proposals go the better down, it would appear, that, without adhering to truth, he wanted to make the funds appear larger than they really were; and, therefore, he greatly exaggerated the charge against Innes and Clark.

As to the other paper, intituled, "Memorandum for Mondole and Baillie Clark," it does not make the smallest mention of any intromission by them; and, therefore, the respondents must own, they are at a loss to discover for what reason it is produced.

The respondents are, therefore, humbly persuaded, that your Lordships will be of opinion, that the petitioner can receive no aid in this question from the new production, but that the cause stands precisely where it did; and, therefore, it would be improper, in them, to trouble your Lordships, with many words, in refuting what was repeatedly stated in the former papers, and which was disregarded when the interlocutors now reclaimed against were pronounced, as it did not appear that there was any evidence which could create a presumption, or even a *suspicion*, that Innes and Clark had intromitted with these rents from the 1694, when they had no title to intromit with one farthing, sooner than the 1709, and that the necessary writings had not been put into their hands sooner than the 1710.

The argument in the petition amounts to this; the petitioner endeavours to show, that some of the tenants who possessed the lands in 1694, continued in the possession for some years after 1709; and from thence he concludes, that, as they would not have been allowed to remain in the possession, unless they had been paid up the whole arrears, that therefore the arrears due before 1709, must all have been paid up to some person or other; and, he says, that, as Sir James Sinclair of Mey was denuded of the lands, by the judicial sale and decret of division, that he had no title to intromit with the rents; that it appears from the decret of exoneration, obtained by Plaids's tutor, that he had no intromission with these rents; and that it likewise appears, from the process of count and reckoning, that was brought against Plaids's curators, that they had not intromitted with the rents of Cannisby; and, as no other person can be condescended upon, who had even the pretence of a title to possess, it must therefore follow, that the rents *remained* in the tenants hands, till Innes and Clark took the conveyance from Plaids, and that they thereafter, in virtue of these powers, uplifted the whole from the year 1694.

The above is the substance of the argument in the petition, and which, when duly examined, must, with submission, appear to be

be very inconclusive. By the backbonds granted by Innes and Clark to Plaids, and by which they are made accountable to him, it is expressly declared that they are not to be made liable for omiffions, but for their actual intromiffions only ; and, therefore, it is not fufficient to fhew that they might have intromitted ; but it muft be proved by pofitive evidence that they actually did intromit. They are not to be concluded by prefumptions or conjectures, efpecially in oppofition to the higheft probablity, viz. that the rents would not be allowed to remain in the tenants hands from 1694 to 1709 ; and, indeed, it is eftablifhed by the interlocutor of the Lord ordinary, of 14th July 1768, and fo far affirmed by your Lordfhips, that poffeffion was not, in this cafe, to be eftablifhed againft Innes and Clark, *upon bare prefumptions*.

In the first place, the respondents do deny that there is fufficient evidence that any of thofe who were tenants in the 1694, continued to be tenants till after the 1709 ; their being of the fame name, is not fufficient evidence of the fact. 2do, The petitioner only alledges that this was the fact, with refpect to three of the tenants, and as it appears from the decreet of divifion 1696, that the lands were then poffeffed by *ten* tenants, the poffeffion of thefe three, if the fame with thefe mentioned in the decree of divifion, muft have been but a fmall part of the lands ; and thefe three having continued in the poffeffion, can be no evidence as to the remaining feven, and that all arrears had been paid up by them.

And, 3tio, Although it were admitted, that the whole rents from the 1694, had been paid to fome perfon or other, without any lofs, yet the respondents do deny that any circumftances are condefcended upon which can either create a prefumption or fufpicion, far lefs that can amount to a proof, that Innes and Clark uplifted the rents from the 1694. It is not incumbent upon the respondents, at this diftance of time, to account what became of thefe rents. They might have been difpofed of in fundry different ways, which the respondents had no occafion to know, nor can be bound to point out ; and it muft appear to be a very arduous task which the petitioner has undertaken. viz. to prove that it was impoffible for any other perfon to intromit with thefe rents, except Innes and Clark.

It

It appears from the summons produced by the petitioner, at the instance of Plaids against his tutors, that Alexander Cuthbert, the accepting tutor, had never accounted for his intromissions; so that it is quite incomprehensible, how it can appear from accounts which do not exist, that these rents had not been intromitted with by the tutor: and, as to the decret of exoneration, mentioned in the petition, none such is produced in process. At the same time, the respondents do admit, that it is highly probable, that no part of these rents was uplifted by the tutor, for this very good reason, that the tutory expired in the 1696, the very year in which the decret of division, allotting the lands of West Cannisby to Provost Cuthbert's representative, was pronounced.

From the foresaid summons, it appears, that immediately upon the expiry of John Cuthbert's pupillarity in 1696, George Cuthbert of Castlehill acted as sole curator for him; and, as it appears, that he intromitted with the minor's rents and effects, the legal presumption is, that he intromitted also with the rents of West Cannisby; and, accordingly, the foresaid summons, at the minor's instance, concludes, *inter alia*, for payment [of 1000 l. Scots, as the mails and duties of his lands and estate yearly, for the crops 1696, to 1702, *inclusive*, being the seven years of Plaids's curatory; and these rents, as well as Castlehill's whole other intromissions, were included in the general discharge before mentioned, impetrated by Castlehill from Plaids in the year 1712; so that there is no room for alledging, that these rents were not intromitted with by the curator; on the contrary, as it was his duty to uplift these rents yearly, the presumption is (and there is no reason to doubt that it was the fact) that the curator uplifted the whole rents that fell due during his curatory, and also what arrears were due at the commencement of his office.

But further, supposing it were admitted, that the curator uplifted none of these rents, the respondents do deny, that any presumption, or probability would from thence arise, that these rents remained in the hands of the tenants, down to the 1709. Plaids himself became major in the 1702. It was seven years thereafter, before James and Clark had any title to uplift a penny of these rents. Plaids himself was in imbrassled circumstances, and confessedly stood much in need of money. The petitioner has been

at pains to point out the tenants in these lands as in an opulent and flourishing condition ; and, therefore, supposing, that neither the tutor nor curator had uplifted a penny of these rents, it is impossible to doubt, that every shilling that could be got of them, would be taken up by Plaids himself.

Indeed, it is altogether improbable, that the tenants of these lands should have been allowed to possess for 16 years, without paying any rent ; but very satisfying evidence, that these rents were not allowed to lie over, and that they were not intromitted with by Innes and Clark, arises from this circumstance, that John Cuthbert of Castlehill, when he brought an action in the 1732, against the representatives of Innes and Clark, and Sir Patrick Dunbar, to account for their intromissions, only concluded against them for the rents of West Cannisby, *for crop 1711, and downwards*. John Cuthbert of Castlehill's father, as has*been already observed, was the sole acting curator for Plaids. John Cuthbert himself got a conveyance to the backbonds, granted by Innes and Clark in the year 1713. There cannot be a doubt, that he knew well, and better than can be known now, how far Innes and Clark's intromissions had extended, and what intromissions his own father had, as curator ; and when he, in the foresaid summons, does only conclude for crop 1711, and in the proceedings in the after-submission, never pretended to charge the rents of these lands farther back, your Lordships must be satisfied, that there is not the least foundation for the wild imagination taken up by the petitioner, that the rents of these lands were allowed to *remain* in the hands of the tenants for the space of 16 years, and were uplifted by Innes and Clark, in consequence of the powers which they got from Plaids in the years 1709 and 1710.

The petitioner has thought proper to found upon some of the accounts recovered amongst Clerk Campbell's papers. He says, that in the account with Donald Williamson, there is stated the rent for the 1715, and the rent 1716 ; and, besides, there is stated to the debit of the tenant an article, under the name of *old rests*, from which he concludes, that these were arrears of an ancient date, of which a separate account had been kept from the rent of later years ; and that Campbell had been uplifting arrears of a long standing.

But the respondent will be pardoned to say, that the conjecture is extravagant. Upon the supposition, that the rents had been owing by the tenants, as far back as the petitioner is pleased to suppose, it cannot be believed, that two accounts would have been opened with the tenants, one for the years falling due, posterior to the commencement of Innes and Clark's right, and another for the arrears of former years. As the right was equally good for the whole rents, either bygone, or in time coming, so it is inconsistent with common sense to suppose, that they would not have made a regular application of the money they received, to extinguish the rents that were due, and that they would never have applied a payment to the rent of a later year, if former years were due.

The petitioner says, That in all the three deeds above mentioned, taken from Plaids, Innes and Clark are specially assigned, not only to the current rents, but also to bygones, which, he says, is a plain confession, that there were certain bygone rents then due, in the tenants hands.

But, supposing it were admitted, that arrears were due, that will not be sufficient to support the petitioner in the extravagant demand that he is now making for 15 or 16 years rent.

2do, The deeds themselves, are above recited, and it is plain, that no argument whatever can from thence arise, in favours of the petitioner; they are conceived in the common and ordinary stile of such deeds; and, indeed, the clause referred to, respects the *whole* estate of Mey, as contained in the apprisings. And,

3tio, The first deed bears date in August 1709, so that one term's rent of that crop had become due at the Whitsunday preceeding; and, therefore, these deeds might, with great propriety, have assigned Innes and Plaids to rents then due, without supposing, that one farthing of crop 1708, or any preceeding crop was in arrear.

There are other things mentioned in the petition; but, as they were all fully insisted upon in the former papers in this cause, and were disregard, and repeatedly over-ruled by your Lordships, the respondents will not trouble your Lordships, with again taking notice of them more particularly. Upon the whole, they are humbly confident, that, if the question was still entire (which, with submission, it is not) your Lordships will be of opinion,
that

that the cause stands just where it did formerly, and that the petitioner's hypothesis is not only unsupported by evidence, but is in itself highly improbable, and contrary to the declared understanding of his own father, who, of all others, had the best access, to know the real state of the fact ; and, therefore, it is hoped, that your Lordships will have no difficulty to refuse the petition, and adhere to the former interlocutors.

Indeed it is believed, that nothing more was intended by the petition than a delay. And, it is submitted to your Lordships, if something farther ought not to be done, to put a check to that uncommon spirit for litigation, which has shown itself in this cause, and, by which, the respondents have incurred a very great expence. About 20 representations, and 6 reclaiming petitions have been presented for the defender in this process, when only one representation, and one reclaiming petition, have, during a dependence of seven years, been given in upon the part of the respondents.

In respect whereof, &c.

R O. MACQUEEN.



MARCH 9, 1771.

Unto the Right Honourable the Lords of Council and Session,

THE
P E T I T I O N
O F

Mrs. ELIZABETH DUNBAR, lawful Daughter, and universal Disponee of the deceased Sir Patrick Dunbar of Northfield, and James Sinclair of Dunren, Esquire, her Husband, for his Interest,

Humbly sheweth,

THAT George Viscount of Tarbat, afterwards Earl of Cromarty, having purchased, at a judicial sale, part of the estate, which belonged to Sir James Sinclair of July 1694⁺ Mey, was decerned, by the decret dividing the price,²¹ Febr. 1695⁺ to pay to those having right to two apprisings affecting that estate, led at the instance of Alexander Cuthbert, provost, and Alexander Dunbar, merchant in Inverness, the sum of 5154l. 15s. 10d. with that of 331l. both Scots, and Interest from Whitfunday 1694, and in time coming, during the not-payment.

That William Innes, writer to the signet, who purchased another part of the estate, for the behoof of Mr. Sinclair of Ulbster, was in like manner decerned to pay to the same persons the sum of 1071l. 12s. 4d. Scots, with Interest from Whitfunday 1694.

The rest of the estate in Caithness did not find a purchaser, and therefore was divided amongst the creditors, and, by the decret
A of

28 Febr.
1676.

of division, of this date, there was allotted to those having right to the foresaid two apprisings, the three penny, three farthing and an half octo of the lands of West Cannitby, then said to be possessed by ten tenants, therein named, and scarcely yielding 300 merks of yearly rent.

That the foresaid apprisings were originally led in 1664, at the instance of the said Alexander Cuthbert and Alexander Dunbar ; but Dunbar having in 1676 made over his apprising to Alexander Cuthbert, both apprisings came afterwards into the person of the deceased John Cuthbert of Plaids, grand-nephew and heir of the provost.

15 August,
1709.

Plaids came very soon to be reduced to great distress, on account of the debts he owed, and which was greatly occasioned through the mismanagement of his curator, George Cuthbert of Castlehill. In this situation, the deceased Robert Innes of Mondole, and Alexander Clark, baillie of Inverness, interposed their credit for his relief, as well from compassion, as from regard to his deceased father. It appears, that it was by their means, that he was saved from rotting in jail, as none of his other friends would advance any thing for his relief ; and, as they in this way became considerable creditors to Plaids, and were most justly intitled to be secured of their reimbursement, so it appears, that, of this date, the said John Cuthbert of Plaids, in the character of heir served and retoured to the said Provost Cuthbert, his grand-uncle, and for *certain very onerous causes and considerations*, granted a deed, in the form of an *irrevocable* factory, in favour of the said Robert Innes and Alexander Clark, containing an obligation to grant a deed in their favour in more ample form, and to deliver the necessary writings therewith. This factory appears not to have taken effect, and must have been returned to Plaids, as the same was never recorded, and the principal itself was produced by the defender in this process, who, no doubt, must have found it amongst the papers of his author, John Cuthbert of Plaids.

28 Oct. 1711,
1712.

Plaids did afterwards, of this date, execute a disposition in favours of Innes and Clark, of the apprisings against the estate of Mey, with the shares of the price and lands allocate thereto ; as also, assigned them to the sum of 6000 merks, with penalty and annualrent, contained in a bond of provision, said to be granted by

by Sir James Dunbar of Hempriggs, to Mrs. Katharine Sutherland, spouse to the said John Cuthbert.

That, as this last mentioned deed was considered to be incomplete, the said John Cuthbert, by a disposition, of this date, which narrates the foresaid disposition, did, in further corroboration of the same, convey to the said Messieurs Innes and Clark, the foresaid two decreets of apprising, with the lands and estate thereby adjudged, lying in the shires of Ross and Caithness. This disposition contains an assignation to the mails and duties of the *baill* lands contained in the apprisings thereby conveyed, *of all years and terms bygone resting unpaid, and yearly and termly in time coming*; as also, a clause of delivery in the following terms: "Likeas, I have herewith delivered to the said Robert Innes and Mr. Alexander Clark, the *baill* writs and evidents of, and concerning the premisses, conform to an inventory thereof apart, to be subscribed by me, and the said Robert Innes and Mr. Alexander Clark, mutually." So that it is evident, that *all* the writings relative to these apprisings, as well as an extract of the decret of division, before mentioned, which is specified in that conveyance, must have been then only delivered up; but the foresaid bond of provision for 6000 merks, is not so much as mentioned in this deed, and appears never to have been delivered to Innes and Clark.

And, in order the more effectually to vest the subjects, and to complete titles thereto, in the persons of Innes and Clark, it was thought proper, that Plaids should at the same time grant them a bond for 50,000 merks, for the purpose of leading an adjudication against himself, on a charge to enter heir to his grand-uncle, Provost Cuthbert, which accordingly was done, by decret of adjudication, of this date.

These conveyances were, *ex facie*, absolute and irredeemable, and therefore Innes and Clark, by their back-bonds, of even dates with the said two dispositions, subsuming, "That albeit the same did bear to be granted for an onerous cause, yet that they were granted to the said Robert Innes and Alexander Clark, partly as a security to themselves, and partly in trust, in order to manage the said John Cuthbert's affairs, *upon the terms and conditions under written*," did therefore become bound, to render an account to Plaids, his heirs and assignees, of all sums that they should receive by virtue of the dispositions, and bond before mentioned;

30 January,
1710.

29 June,
1710.

mentioned ; but it was thereby specially provided, that out of the first and readiest of any sums that they should recover, they should be allowed *to retain in their own hands* as much thereof, as would satisfy and pay them all debts and sums of money due by Plaids, or his father and grand-uncle, which they either had already satisfied and cleared, or should thereafter satisfy and clear, with all sums of money, which they either had already advanced, or should advance to Plaids himself, or which they had expended, or should expend, in making the subjects effectual, together with a competent salary for their pains, *in paying the said John Cuthbert his debts, and managing his affairs* ; and they being once fully satisfied and paid of all the said sums expended, and to be expended by them, the overplus, if any was, to be paid by them to Plaids, and his forefairs.

It was further provided, “ That they should only be accountable according to their intromissions, and whatever they should accept, receive, or take, by virtue of the said rights ; but that they should not be liable for omissions, and should not be prejudged or limited by the back bonds, in the power and faculty given them by the foresaid dispositions, of disposing of the subjects disposed, at pleasure.”

It appears from the vouchers produced in process, that Innes and Clark had, prior to the date of the last mentioned disposition in January 1710, advanced considerable sums to and for the said John Cuthbert, besides their other engagements for him to his creditors, in order to relieve him from jail.

December 8, 1709. And the said John Cuthbert, by his declaration and obligation, of this date, reciting, that Innes and Clark had transacted several debts due by him, and accumulate the principals, annualrents, and expences, in the bonds and transactions granted by them thereanent, and which accumulate sums bore annualrent from the respective times of their transactions ; and subscribing, “ That it being reasonable, that the said Robert Innes and Alexander Clark should be no losers thereby, especially seeing the funds made over by me for their relief and repayment, have not yet answered, and will take some time ere they be made effectual ; and it being also reasonable, for the same cause, that such moneys as they advance to myself, from time to time, in borrowing, should also bear annualrent, from the several times of advance-
ment

"ment thereof," therefore, he thereby became bound to allow them annualrent for the sums which they had transacted and paid, or should transact and pay for him, as well as for the sums lent or to be lent by them to him, and that from the time of the advancing thereof.

Innes and Clark trusting to the security granted by the foresaid deeds, and expecting they would be able to make the money effectual, proceeded and continued in clearing Plaids's debts, and they are proved, by vouchers produced, to have advanced and paid for him, sums which, with the interest from the respective periods of advance down to this day, will amount to upwards of 2000 l. sterling.

It is obvious, that, until the last mentioned disposition in January 1710, when, and no sooner, the writings relative to the premisses, were delivered over to them, that Innes and Clark could take no effectual step towards recovering any of the subjects so conveyed to them: And, accordingly, they did all in their power to recover the money from the Earl of Cromarty and William Innes; for, of this date, they preferred a petition to the Court of July 24,
Session, praying warrant for registrating the bonds for the shares 1710.
of the price of the Estate of Mey, purchased by the Earl and Mr. Innes, and falling to the foresaid two apprisings.

This application was opposed, both by the Earl and Mr. Innes; and it was particularly set forth in the answers on the part of the Earl, that he was creditor to John Cuthbert, in sums equivalent to what he was preferred to, out of the price of the lands purchased by the Earl; and, of this date, the court, upon advising the pe- July 29,
tition and answers, were pleased to refuse the desire thereof. 1710.

Thereafter, Innes and Clark made several attempts to settle matters amicably with his Lordship, and actually entered into a submission with him for that purpose; but as the Earl died in the year 1714, this submission did not take effect. Innes and Clark afterwards attempted to get matters settled with his son, John Earl of Cromarty; but the confusion of his affairs rendered this attempt abortive. However, these steps, although they had not the effect of recovering payment, yet they had the effect of preserving the claim from being lost by prescription; and, accordingly, they were the only documents of interruption, that were afterwards founded upon in answer to the plea of prescription in-

sisted upon by his Majesty's advocate, in the course of discussing the claim that was entered for these debts upon the forfeited estate of Cromarty, subsequent to the rebellion 1745.

Novemb. 24, 1712. Innes and Clark, of this date, appear, from evidence now produced, to have received from William Innes the sum of 1071 l. 12 s. 4 d. Scots, with Interest thereof from Whit Sunday 1694, extending, in whole, to about 2500 l. Scots; but it appears from documents in process, that Innes and Clark had, prior to this period, advanced to and for John Cuthbert, sums amounting to upwards of 5000 l. Scots.

The said George Cuthbert of Castlehill appears to have acted as sole curator for Plaids, upon expiry of his pupillarity, which happened in the 1696, the year in which the decret of division, before mentioned, was obtained. As Castlehill never had rendered an account of his intromissions, and his management had been most gross, an action of count and reckoning at Plaids's instance, was, in the year 1713, brought against him before the court of session; but Castlehill, aware of the consequences of the action, and conscious of his mal-administration, had the address previously, of this date, to impetrate from Plaids, a discharge of his intromissions, and of all demands.

Novemb. 24, 1712. This discharge was procured and signed at Inches, an obscure place in the country, *remotis arbitris*, and without any friend being present on behalf of Plaids, or even acquainted with the affair. It bears to be written by one Donald Cuthbert, Castlehill's ordinary writer, at Inverness, and witnessed by him and one of Castlehill's servants. It is conceived in most anxious terms, discharging Castlehill, in *general*, of all his intromissions of whatever nature, quantity, or quality, by bonds, factories, tacks, rights, dispositions, or *any other manner of way*, intromitted with, uplifted and received by him, for, and in name and behalf of the said John Cuthbert, then his pupil, during his pupillarity, or *any time by-gone or since*, preceeding the date of the discharge, and of all clags, claims, questions, controversies, millives, accounts, or *any thing else, either of intromissions or omissions*, for whatever cause or occasion preceeding that date. And although it is therein said, that several debts had been paid for Plaids, of which, therefore, the vouchers fell to be delivered up to him, yet no account whatever was instituted, nor were any vouchers delivered up.

This

This extraordinary discharge, which Castlehill had impetrated from Plaids, did not make its appearance for some time ; and no wonder he was unwilling to found upon it, considering the manner in which it was obtained. However, after the process of count and reckoning had gone on for some time, it was produced, and it put an end to the action.

Castlehill, however, not contented with the advantage he had thus gained, had also the address to obtain from Plaids, in name of his son, John Cuthbert of Castlehill, father of the defender, an assignation, of this date, of the foresaid back-bonds granted by Innes and Clark, and to the power thereby given to Plaids of calling him to account for their intromissions. July 17,
1713.

The cause of this assignation, as appears by Castlehill's back-bond, of even date, is said to be in security and payment, in the first place, of the principal sum of 4200 l. Scots, and interest, alledged to be contained in a bond of corroboration, of the date of the foresaid discharge, also then impetrated from Plaids, by and in favours of old Castlehill, and which is excepted from the said discharge ; and, in the next place, in security and payment of certain other debts pretended to be due, partly to John Cuthbert of Castlehill himself, and partly to his father George Cuthbert, prior to the date of the mutual discharge.

But none of the grounds of debt, for security and payment of which this assignation appears to be granted by Plaids, have been produced, in this process, by the defender. And, notwithstanding that old Castlehill, the father, was alive at the time, yet the assignation is taken to John the son, though he had no right, in his person, to those pretended debts.

Castlehill's right, therefore, for any thing that yet appears, seems to have been very suspicious, and without any just foundation ; and the assignation that was lately taken from Plaids's daughter, is a corroborative proof of it. Nor does that assignation mend the matter much, because the woman was extremely poor, of whom her straits rendered it very easy to take the advantage ; and the only value pretended to be given for it was, a promise of 50 l. sterling to be paid after receiving the money from the Crown, a consideration by no means adequate to the large sums thereby given away, and, consequently, deserving of no favour.

Alexander

October 21, 1719. Alexander Clark, one of the original disponees, having been nominated executor to the deceased Mr. Robert Frazer, advocate, Sir Patrick Dunbar, the petitioner's father, became cautioner for him in the confirmation; and he was thereafter decerned, particularly by a decreet-arbitral, standing on record, pronounced by the late Lord Elchies, to pay very considerable sums for Clark, on account of that cautionry. Clark therefore did, as he was bound to do, dispose and make over to Sir Patrick Dunbar, his heirs and assignees, the two apprisings aforesaid, and all following thereon, the decreet of division, and sums thereby due, with the foresaid lands of West Cannisby, and mails and duties thereof from Whitsunday 1719.

November 14, 1719. Thus Sir Patrick Dunbar acquired full right to all the interest which Clark had in the foresaid debt; and as Clark had been obliged to pay for Innes, the other disponee, very large sums, of which he was entitled to relief, these Clark did also, by assignation, of the same date, make over to Sir Patrick, on which Sir Patrick obtained himself decerned executor-creditor to Innes before the commissary of Moray; and having charged Jonathan Innes, eldest son and apparent heir of the said Robert Innes, to enter heir to his father, he obtained a decreet *cognitionis causa*; and the petitioners, as in the right of Sir Patrick, did afterwards obtain a right of adjudication *contra hereditatem jacentem*.

February 1, 1720. Sir Patrick did, soon after acquiring the right, intimate the same to the Earl of Cromarty, as appears from an instrument of intimation, of this date, produced.

Sir Patrick likewise took other steps for recovering the money, and more particularly, he, in 1733, entered into a submission with the Earl, to which Castlehill was a party; but the Earl, who had the money to pay, endeavoured, as well as Castlehill, to protract the decision, and the submission at length was allowed to expire. The embarrassed situation of the affairs of the family of Cromarty, prevented Sir Patrick from recovering his payment, and the Earl was at length forfeited on account of his accession to the rebellion 1745.

John Cuthbert of Castlehill, having acquired right to the backbonds in manner above mentioned, did, in the year 1713, commence an action against Innes and Clark to account for their intromissions,

promissions, in which, however, he did not think proper to insist.

He afterwards, in 1732, after the death of Innes and Clark, and also of Plaids, brought an action against the representatives of Innes and Clark, and Sir Patrick Dunbar, their assignee, for denuding in his favours, and concluding for payment of the rents of the lands of West Cannisby, for the crop and year 1711, and since; and also against the Earl of Cromarty and the representatives of William Innes, for payment of the shares of the price of these parts of the estates of Mey, severally purchased by them.

This process was called, but never insisted in. However, in the year thereafter, his son, George Cuthbert of Castlehill, became party to the submission already mentioned, but upon which no determination followed. And upon the blowing up of this submission, the said George Cuthbert of Castlehill, raised a new action in 1734, in the same terms with that raised by his father John Cuthbert in the 1732. *However*, no procedure was had upon this action, which shows that Castlehill entertained no good idea of his claim, which probably would never more have been heard of, had it not been for an *accident*, to be immediately noticed; and which, though it did not alter the *nature* of Castlehill's right, or give a better title than he originally had, yet has eventually been the occasion of much litigation, trouble, and expence to the petitioners.

After the late Earl's forfeiture, Sir Patrick Dunbar was a very old man, and lived in the remote county of Caithness; his doer, Mr. Ludovick Brodie, was then greatly advanced in years, and as no notification of the survey of these estates was directed to be made in the publick news papers, the six months allowed to the creditors for entering their claims expired, before Sir Patrick or his doer were apprised of the survey.

The deceased Lady Castlehill, the now defender's cedent, taking advantage of this circumstance, and having patched up a title upon a general disposition from John Cuthbert of Castlehill, her husband, who, as assignee by Plaids to Innes and Clark's backbonds, stood in the right of reversion, entered a claim upon the estate of Cromarty, for the sums above mentioned due by the Earl; and which claim was accordingly sustained.

C

During

During the dependence of the claim, Sir Patrick entered a caveat that his right should be preserved entire, notwithstanding of the claim's being entered by Lady Castlehill; for he being possessed of the writings necessary for supporting the claim, and having been called on a diligence for that effect, did then assert his 1756-right before the Lord Woodhall ordinary; and his Lordship, by his interlocutor, expressly reserved to Sir Patrick, notwithstanding his producing the writings called for, *all right and title which he had to the subject then claimed by Lady Castlehill.*

Lady Castlehill acquiesced in this interlocutor, and proceeded to get her claim sustained; and Sir Patrick was only prevented by death, from commencing an action, which he was advised it was proper in this situation of affairs for him to do, for having it found and declared, by decret of this court, against the said Mrs. Jean Hay Lady Castlehill, that he had, on the titles aforesaid, the prior and preferable right to the money, with the best and only title to uplift, receive, and discharge the same, and that she should denude of the decret sustaining the claim in her favour, upon being refunded of the expences debursed in getting the claims sustained.

That action which Sir Patrick himself was prevented from instituting, the petitioners brought in 1764, which action came in course before the Lord Gardenston ordinary, and in which a litigation has been maintained on the part of the defender, which it is happy but very rarely occurs in this court: Every possible device that imagination could suggest, has been fallen upon to protract, delay, and embarrass the cause.

The principal defence insisted upon was, that Sir Patrick and his predecessors and authors had been satisfied and paid by intromissions with Plaids's effects. A condescendence was thereupon exhibited by the petitioners, in which, notwithstanding that they were singular successors, and could not know the intromissions of their authors, or be personally acquainted with transactions, which happened mostly before they were born, they had the candor to acknowledge, that they observed from the writs in process, that Sir Patrick Dunbar had right, in the year 1719, to the lands of West Cannisby, the rent whereof amounted to about 300 Marks or thereby; and these were all the intromissions of which they had the least information.

The

The above was a full, and the only condescendence which they could, consistently with truth, exhibit. They could not condescend on, or charge themselves with, or give credit for, intrusions of which they had never heard; and they had no occasion to know that the 1071 l. above mentioned, had been recovered by Innes and Clark from William Innes. This sum was an article in the summons, which Castlehill himself raised in the 1732, and for payment of which he concluded against William Innes's representatives; after which the respondents could not have the least reason to suspect that that sum had been uplifted by Innes and Clark; but the moment it appeared to have been paid, they admitted that this sum should be charged against them.

The defender, who affected, that she would prove superintromissions, was, for this purpose, allowed diligence after diligence, during a dependence of many months. These diligences were again and again renewed, and the defender examined every mortal, who she suspected, or pretended could give her any information, but without effect. At last, memorials were directed to be given in upon the whole cause; the defender would not comply with this appointment without a plea, and it cost several inrolments, before the memorials were forced into process; on which, after some other procedure, the Lord ordinary, of this date, Febr. 11, found, "That the pursuer is intitled to insist, that the defender shall *denude* in her favour, *in so far as the said pursuer shall instruct, that Innes and Clark were creditors to Plaids*; and that she is not obliged to instruct, to what extent Sir Patrick Dunbar was creditor to Innes and Clark, his authors." June 21,
1765.

The defender, not satisfied with this interlocutor, disputed the petitioners right *in totum*, and presented a reclaiming petition, founding, *inter alia*, on the time above mentioned, limited by the vesting-act, for entering claims on the forfeited estates; and the petitioners knowing their right to be clearly prior and preferable to Lady Castlehill's, who had only the right to the *reversion*, and intitled them to an immediate decret, preferring them to the money; foreseeing too the consequences, which they have since felt by experience, of entering into any unnecessary litigation with the defender, and aware of the game, which they believed would be played, and have since been effectually practised against them, preferred a petition on their part, in which they offered to find the

the best caution, to account for any *overplus* that might be found due out of the fund. after clearing the debt to them.

Your Lordships, on advising these petitions, with answers, were pleased to refuse both, and adhere to the Lord ordinary's interlocutor, with this variation, however, " That the defender, Mrs. Jean Hay, shall be obliged, before she draw the money in question, to find sufficient caution, for *paying back, and repeating* the same to the pursuer and her husband, or what part thereof they shall be found intitled to, in the event of this Process."

On this, the cause having returned to the Lord ordinary, the defender, notwithstanding the full account libelled, and produced with the summons and condescendence, already exhibited, insisted, that the petitioners should give in *another* account of what they called Charge and Discharge of their predecessors intromissions; and the petitioners, rather than delay the cause, by litigating a matter of little consequence, gave in a *second* condescendence or account, to which no objections were made by Lady Cattlehill; and the whole cause, with the account and vouchers, was thereupon remitted by the Lord ordinary to Ludovick Grant, to make up a state of the accounts, and to report his opinion upon the objections and answers thereto.

The defender, however, would not acquiesce even in this remit, however harmless, but preferred several representations, on most frivolous grounds, which, either with or without answers, were refused; and, the report having been made by the accountant, was approved by the Lord ordinary.

From this report it appeared, that the respondents authors, Innes and Clark advanced, and paid to, or on account of Plaids, sums, now amounting to upwards of 2000*l.* sterling; and the advances made by them was so clearly proved by legal vouchers produced, that, however well-disposed the defender was, to dispute every inch with the petitioners, yet she could not contest a single article of these advances. All she adventured to do, was to stop the report for some time from being approved, after which she gave in many representations, insisting, that Innes and Clark, and the petitioners, fell to be charged with sundry articles, for which credit had not been given Plaids, either in the account, or in the report.

These articles, which were four in number, afforded an ample field of litigation, and of which the defender availed herself to
the

June 23,
1727.

June 15,
1728.

the full: and, although the petitioners, from the causes before mentioned, defended themselves at an evident disadvantage, against a person, who had lived at the time of the transactions, and having got possession of Plaids's papers, was minutely informed of every particular; yet, as to the first three articles, they were not only totally unsupported, upon the part of the defender; but the petitioners were lucky enough, to disprove them in the clearest manner.

The fourth and last article, respected the rents of the lands of West Cannisby, which the defender contended ought to be charged against the petitioners authors, as having been intromitted with by them from the 1694 downwards; but this plea was over-ruled by repeated interlocutors of the Lord ordinary; and, particularly, by one, of this date, by which he finds, " That the pursuers are July 4,
1768.

" only obliged to account for the rents of the lands of Cannisby, " from Whitfunday 1719, in respect the defender offers no proof " of an earlier possession by Innes and Clark, the original trustees, " and shows no sufficient cause for resting upon *bare presumptions* " of an earlier possession."

Against these interlocutors the defender preferred a reclaiming petition, in which she not only insisted, with respect to the rents of West Cannisby, but likewise upon the other articles, only one excepted, namely, the 6000 merks bond, which she had not the assurance to introduce into the petition. And, your Lordships, of this date, upon advising the petition and answers, refused the January 25,
1769. desire of the petition, and adhered to the interlocutors of the Lord ordinary, reclaimed against.

It is material here to observe, that, by this interlocutor, it was finally adjudged, that no possession or intromission could be made against Innes and Clark *on presumptions*, but, that they were no further liable, than for actual intromissions proved upon them by positive evidence; and, on this fixed principle, the cause having returned to the Lord ordinary, the defender expressly offered, and insisted to be allowed to bring a proof, that they had possessed, and intromitted with the rents of the lands of Cannisby from the 1694.

A condescendence was accordingly exhibited of the fact, on which a proof was granted. The Lord ordinary pronounced several interlocutors, finding, that the defender had not brought

D any

any sufficient evidence, to prove or instruct, that Innes and Clark had possession of the lands of West Cannisby, prior to the disposition in favour of Sir Patrick Dunbar in 1719.

February 1, 1770. These interlocutors the defender brought before your Lordships in a reclaiming petition, which, upon answers, was, of this date, refused; and your Lordships, at the same time, remitted to the Lord Ordinary to grant warrant for inspecting the account-books and papers of the deceased William Campbell, late sheriff-clerk of Caithness, who, it was alledged, had acted as factor for provost Clark; and a diligence for recovering the account-books, and other writings of one Alexander Fraser, deceased; and as the defender insisted for exhibition of certain papers in the hands of David Lothian, the petitioners agent, it was further remitted to his Lordship to do therein as he should see cause, as well as to hear parties upon what further the defender condescends upon and offers to prove, relative to the intromissions of Innes and Clark with the aforesaid rents, prior to the 1719.

Before the defender had applied for exhibition of the papers in Mr. Lothian's hands, he had already got Mr. Lothian examined upon oath, who had deposed, that he was not possessed of any papers which could instruct the possession or intromission of Innes and Clark with the rents of West Cannisby, prior to the 1719. The demand, therefore, that he should exhibit the papers themselves, after having deposed to their contents, appeared plainly intended for delay, as every step of the proceedings clearly appeared to be, however, the petitioners, rather than litigate any unnecessary point, agreed that Mr. Lothian should exhibit the papers, which he did accordingly; and it appeared, on inspection, that they did not, in the least, tend to instruct any intromission made by Innes and Clark.

The defender was also allowed warrant and diligence for inspection and recovery of clerk Campbell's papers, and those of Alexander Fraser. The papers were accordingly inspected, and some letters, accounts, and jottings were recovered; several witnesses were also examined, and the proof, both written and parole, being reported, the Lord ordinary, after memorials were lodged, directed informations to be put in on the import of it; and your Lordships, upon advising thereof, of this date, pronounced the following interlocutor: " On report of the Lord Gardenston, ordinary,

" nary, and having advised informations given in, the Lords find
 " the pursuers accountable for the rents of the lands of West Cannisby, for crop 1709. and subsequent years."

Against this interlocutor, a petition was preferred on behalf of the defender, in which he prayed your Lordships to find, that the petitioners were accountable for the rents of the lands of West Cannisby, from the 1694 to the 1709; but this petition your Lordships refused without answers.

As this was, in effect, two consecutive interlocutors upon the same point, which, therefore, by the forms of court, behoved to be final, the now petitioners were hopeful that the cause was in a fair way of being soon ended; but, in this, they were mistaken, for the defender thought proper to prefer a second reclaiming petition, upon pretended *new* evidence, praying your Lordships to find the petitioners accountable for the rents of the fore-said lands of West Cannisby from the 1694.

This petition was appointed to be answered, and accordingly answers were put in thereto; but, before advising, the defender thought proper to apply by petition for a diligence, for recovering the steps of procedure in a process of reduction and improbation, at the instance of John Cuthbert of Plaids, against the Earl of Cromarty, and the proceedings in a submission betwixt the Earl and Innes and Clark. This diligence having been accordingly granted, and the writings wanted recovered, an additional petition was thereafter exhibited upon the part of the defender, to which answers were given in; and the whole having come to be advised, your Lordships, of this date, pronounced the following interlocutor: " The Lords having advised this petition, with the answers, together with the additional petition for Alexander Cuthbert, and the answers, in respect of the new evidence produced, find the original petition competent; and find the pursuers liable for such of the rents of the lands of Cannisby, due betwixt the years 1694 and 1709, as were payable by the tenants who shall appear to have been in possession at the 1709, and remit to the Lord ordinary to proceed accordingly."

February 28,
1771.

Of this interlocutor the petitioners humbly crave a review; and they are humbly confident, that, upon reconsidering the cause, your Lordships will have little difficulty in altering the same, and returning to your former interlocutors.

Your

Your Lordships will observe, that the rents in question, from the 1694 to the 1709, were incurred, and supposed to be due prior to the right granted by Cuthbert of Plaids, in favour of Innes and Clark; so that it is incumbent upon the defender, not only to instruct that so many years rents were *then* resting by the tenants, and in their hands, but also to prove, by clear and positive evidence, that *these* rents were actually uplifted and intromitted with by Innes and Clark, without which it is impossible that the defender can prevail in this question.

By the back-bonds granted by Innes and Clark to Plaids, and by which they were to be accountable, it is expressly declared, that they are not to be made liable for omissions, but for their *actual intromissions only*; and therefore, it is not even sufficient to show, that Innes and Clark might have intromitted, (was that to be supposed in the present question) but it must be proved, by positive evidence, that they actually did intromit. They are not to be concluded by presumptions and conjectures, in opposition to the highest probability, viz. that the rents would be allowed to remain in the tenants hands from the 1694, to the 1709; and, indeed, it is established by the interlocutor of the Lord Ordinary, of the 14th of July 1768, and so far affirmed by your Lordships, that intromission was not, in this case to be established against Innes and Clark *upon bare presumptions*.

It was said, that as no accounts of Innes and Clark's intromissions, under their hand, has been preserved and produced, every thing therefore, is to be *presumed* against them.

But, with submission, this is a most extraordinary reason for subjecting the petitioners to account for the rents in question. If this doctrine was to take place, it would be equally good to subject them to any *other* demand the defender should be pleased to make. For ought that the petitioners know, Innes and Clark might have regularly given in accounts of their intromissions to Cuthbert of Plaids, and, from the necessitous circumstances, he appears to have been in, it is highly probable that this was the case; but as the petitioners are singular successors, and are not possessed of the papers of Innes and Clark, or of Cuthbert of Plaids, it cannot be expected that they can know any thing with certainty about the matter. The keeping and preserving an account of their intromissions, was not a *condition* imposed upon Innes and Clark

by

by their back-bonds, nor was there any forfeiture or penalty stipulated, in case of their neglecting so to do; on the contrary, it is thereby declared, that they were not to be liable for *omissions*, and they could only account for their intromissions, when called upon for that purpose, and there is no evidence that this was refused.

The subjects that were conveyed to Innes and Clark, were, 1st, The share of the price of the lands purchased by the Earl of Cromarty, and Interest due thereon. 2dly, The share of the price of those purchased by William Innes, with interest. And, 3dly, The Lands of West Cannisby.

The first of these, is admitted, on all hands, never to have been unuplifted, and was, as already noticed, the foundation of a claim upon the forfeited estate of Cromarty, and is now the subject of the present process. The 2d was uplifted by Innes and Clark, and is admitted to be a charge against them; and your Lordships have found the petitioners, in their right, accountable for the rents of West Cannisby for the year 1709, and downwards; so that there is not the smallest reason to doubt, but that Innes and Clark's whole intromissions are already fully ascertained and accounted for.

It was likewise said, that the petitioners were here claiming a *debt*, and that, *in re tam antiqua*, less evidence was required to presume the payment of such debt, than if the matter had been more recent.

But this is a mistake, and the very reverse is really the case. The present action at the petitioners instance is, for having it declared, that they have the prior and preferable right to the money in question upon the estate of Cromarty, and the best and only title to receive, uplift, and discharge the same. The defender, upon the other hand, as having right by progress to the back-bonds granted by Innes and Clark, is endeavouring to establish a *debt* against the petitioners, in their right, by insisting that they shall be accountable for the rents of West Cannisby betwixt the 1694 and the 1709, in order to extinguish and compensate *pro tanto* the debts due by Plaids to Innes and Clark; which debts are all ascertained by unexceptionable documents. So that the matter must be considered in the same light as if the defender was in an action against the petitioners, for their accounting for Innes and Clark's intromissions in terms of their back-bonds.

It appears that the professed purpose and intention of the processes raised by the defender's father, John Cuthbert of Castlehill, was to call the petitioners authors to *account* for their intromissions, in terms of their back bonds; and it is, with submission, impossible that the alledged intromissions of Innes and Clark can be established by *other means* than would have been requisite to found the defender in an action for that purpose.

Neither can it afford any argument in favour of the defender, that the matter has become ancient. The petitioners authors could not bring a process against themselves, to account for their intromissions; they were only, by their back-bonds, to render an account when required, and were to not be liable for ommissions. And although the defender's father, Castlehill, who had right from Plaids to Innes and Clark's backbonds, as early as the 1713, brought processes for count and reckoning, yet he never insisted in these processes, but allowed them to drop; and if any disadvantage arises to the defender by the lapse of time, it is the fault of the defender's father, and not of the petitioners. But, as in the processes which the defender's father raised, he specially concluded, that the petitioners authors should only account for the rents of West Cannilby for the crop 1711 and downwards, this is a circumstance, in a matter where the defender's father, who could not miss to know how the fact stood, that is of itself perfectly conclusive against the defender, as to Innes and Clark's supposed intromission with the rents of these lands from the 1694; at least it ought to have the effect to oblige the defender to prove his allegation by clear, direct, and positive evidence, which he has not hitherto pretended to do.

And this leads the petitioners to examine the circumstances condescended on by the defender, for proving his alledgeance, 1st, That the rents from the 1694 to the 1709, remained in the tenants hands unuplifted. And, 2dly, that the rents of such of the tenants in that period, who are supposed to have continued in possession after the 1709, were then intromitted with by Innes and Clark, or by others on their account.

And, 1st, with respect to the alledgeance, that the rents from the 1694 to the 1709 remained in the tenants hands unuplifted at that period.

The defender, in the first place, refers to the proceedings under the submission with the Earl of Cromarty, wherein it is said, that
Innes

Innes and Clark, in the answers to the Earl's counter-claim for the ward duties, asserted, that John Cuthbert of Plaids had no possession of Mey's estate in Caithness, from which the defender would infer, that Plaids did not intromit with the rents of the lands of West Cannisby prior to the 1709.

But when the fact is properly stated and attended to, it will clearly appear that the passage referred to, does not in the smallest degree relate to John Cuthbert of Plaids's possession of the lands of West Cannisby in his own right, upon the decret of division prior to the 1709; but that the foresaid passage in the answers, was only a repetition of the defences pled by Plaids and his curators, in the process of declarator after mentioned, raised against him in 1697, at the instance of Mr. Roderick Mackenzie of Prestonhall, for the behoof of his brother the Earl of Cromarty.

The facts respecting this matter are as follow: That the Earl of Cromarty being disappointed in the acquisition of the debt due to Provost Cuthbert, Plaids's granduncle, formed a scheme of possessing himself of materials that might be available, if not to conquer, at least to combat and postpone the payment. In this view, in 1696, a gift of the ward and marriage of John Cuthbert of 1696. Plaids was obtained from the crown in favour of Mr Roderick Mackenzie, the Earl's brother, under the pretext that Provost Cuthbert, who had apprised the estate of Mey in 1694, had passed a charter and infestment on his apprising.

This gift was made the title of a process of declarator of the 1697. ward and marriage of Cuthbert of Plaids, at the instance of Mr. Roderick Mackenzie, the donator, against Plaids, and his tutors and curators, as well as against the tenants and possessors, *nominatim*, of the whole lands and estate of Sir William Sinclair of Mey, lying in the shires of Ross and Caithness.

This process having been called before Lord Crossrig ordinary, on the 16th February 1696, comparance was made for the de-February 16, fendens by their procurators, who stated defences (recited in the 1698. copy of the decret produced, pages 5th and 6th) in the following terms: " Alledged, no process at the pursuer's instance, for the
 " ward-duties libelled against the heirs of Provost Cuthbert, be-
 " cause, 1mo, *neither he nor his predecessors were ever in pos-*
 " *session of the mails and duties libelled.* 2do, It was not in-
 " structed that the lands held ward, and Cuthbert being but an
 appriser,

“ appriſer, was not bound to know the original holding. 3tio,
 “ The lands are not ward, in ſo far as Provost Dunbar was pub-
 “ lickly infeſt *ſimul et ſemel* with Provost Cuthbert, and his ap-
 “ parent heir was major, and married before his deceaſe; and that
 “ the infeſtment being of the whole ward lands, did exclude the
 “ ward, notwithstanding the minority of Cuthbert’s heir; at leaſt
 “ the ward-duties cannot be acclaimed, but only eſſeiring to Cuth-
 “ bert’s own appriſing, with deduction not only of Dunbar’s pro-
 “ portion, but likewiſe of all the other comprifings led within year
 “ and day of them, they having by the act of parliament the be-
 “ neſit of the ſaid infeſtment, as if one comprifing had been led
 “ for the whole ſums.”

June 16,
 1699.
 Theſe defences ſhow the nature, both of the donator’s claim,
 and of the action, which having come to be adviſed in preſence,
 decret was pronounced in terms of the libel, finding and declar-
 ing, that the lands libelled, lying in the ſhire of Caithneſs, where-
 in the ſaid deceaſed Alexander Cuthbert died laſt veſt and ſeaſed,
 fell and became in his Maſteſty’s hands, by reaſon of ward, by de-
 ceaſe of the ſaid Alexander Cuthbert, who died in the month
 of 1681, and minority of John Cuthbert his ap-

parent heir, and that the whole maills and duties of the ſaid the
 lands, ſince the ſaid year 1681, together with the relief, when the
 ſame ſhould happen, did belong to the purſuer, as donator afore-
 ſaid; and alſo finding, *quoad* the lands lying within the ſhire of
 Roſs, that the foreſaid gift of the ward-duties and relief was for
 the behoof the ſaid Mr. Roderick Mackenzie, purſuer, in ſo far as
 extended to the expences of obtaining and declaring the gift, and
 to the ſum of 2000 merks, and bygone annualrents of the ſame,
 from the date of the decret of ſale; and therefore decerning [the
 tenants and poſſeſſors therein named, of the whole foreſaid lands
 and eſtate, lying within the ſhires of Roſs and Caithneſs, to make
 payment and deliverance to the purſuer of the ſeveral quantities of
 victual, and ſums of money libelled, as the yearly rent of the
 ſaid ward lands; and the ſaid

Cuthbert, and his tutors
 and curators, (if he any had) for their intereſt, *as having intromit-*
ted therewith, and that for the ſaid crops and years above ſpecifi-
 ed, and yearly and termly in time coming, during their poſſeſ-
 ſions, and the ſaid Cuthbert, *his minority.*

This

This decret was made the foundation of a collusive decret of forthcoming, which was afterwards obtained before the sheriff of Edinburgh in 1708, at the instance of Prestonhall against his brother Lord Cromarty, to which process Plaids was not made a party, decerning the Earl to make forthcoming to Prestonhall out of the sums in his hands, due to Plaids, as much as would be sufficient to satisfy and pay Prestonhall the claims he pretended to have upon Plaids.

These decreets of declarator and forthcoming were founded upon by the Earl of Cromarty, in the foresaid submission betwixt him and Innes and Clark, as counter-claims for compensating *pro tanto* the sums due to Plaids by the Earl, as purchaser of the estate of Mey.

To this counter-claim, answers or objections were given in on the part of Innes and Clark, in which they repeat the defences that had been formerly made in the foresaid process of declarator of ward and marriage, in the following terms: "The remaining three articles of the counter-claim are founded upon the gift of young Mr. John's ward and marriage; and therefore it is humbly hoped, if that gift do fall, the decreets following thereupon will fall in consequence. But so it is, that at the time of the gift, these casualties were not at the Sovereign's disposal, because the lands were full, in so far as, long prior to the gift, the ward was taxed by a charter in favours of the late Earl himself, *anno* 1680, which was even prior to Provost Cuthbert's decease. And, 2do, Provost Alexander Dunbar was publicly infeft in the said tenement, long prior to Provost Cuthbert's decease; and before Provost Dunbar's decease, his heir was both married and major, and is living to this day. So that it being evident the fee was always full, the casualty of ward and marriage could not fall. And thus the title being null, the objectors need not repeat the many nullities of the two decreets following thereupon, one, of declarator of the Lords of session, and the other of constitution before the sheriff of Edinburgh, at my Lord Prestonhall the donator's instance."

"The objectors beg liberty to hint at some of the nullities of these decreets; and, first, as to the declarator,

"1mo, The time of Provost Cuthbert, the supposed vassal, his death not proven. 2do, The minority of John Cuthbert, the heir,

" heir, not proven. 3tio, The expence of the gift, and declaring
 " the same not liquidated or proven. 4to, The 2000 merks due
 " to my Lord Prestonhall, not otherwise constituted than by his
 " own oath. 5to, The purchasers at the roup of the ward-tenement
 " not called, and yet their tenants decerned in mails and
 " duties. 6to, No personal decerniture could have been against
 " young Mr. Cuthbert for the rent of the lands in Caithness, because
 " he had neither possession nor intromission, and, though
 " he had, the rental is not so much as proven. 7mo, The avail
 " of the marriage and relief are still blank in the decret, which
 " appears to be rather an interlocutory sentence than a decret."
 " And as to the decret of constitution before the sheriffs, 1mo,
 " The decret of declarator falling, the constitution falls in consequence.
 " 2do, This decret of constitution proceeds upon this medium, that the Earl of Cromarty was Cuthbert's debtor,
 " and that he was possessor of the ward-tenement, and therefore,
 " regularly, Cuthbert ought to have been called, which was not
 " done, nor could his money be taken away by a decret, as to
 " him entirely *inter alios* : And this defence, that Cuthbert was
 " not called, was proponed by the Earl, but repelled ; and then
 " his Lordship was holden as confessed, for as much as the pursuer
 " was pleased to libel."

To these objections the Earl gave in the following answers :
 " As to the objections against Prestonhall's gift of Mr. Cuthbert's
 " ward and marriage, and the decreets following thereon, the decret
 " of declarator is opposed, *wherein all these objections are*
 " *proponed and repelled*, or competent and omitted, which will appear
 " evident from the decret itself. So no regard can now be
 " had to these objections after a decret *in foro*."

From this state of the proceedings, it is evident that Innes and Clark, in objecting to the Earl of Cromarty's counter-claim, which was founded upon the foresaid decret of declarator of Plaids's ward, did no more than repeat or recite the defences which had been pleaded in the process upon which the said decret proceeded, and state the nullities which they alleged occurred against that decret. The answers or objections before mentioned, made by them to Lord Cromarty's claim, do clearly refer to the decret of declarator, and to the defences therein stated, which show, that the possession thereby meant, was the possession *prior* to the stating
 of

of the defence in 1698, and obtaining of the declarator, as that was pleaded as a reason why the decret was null, and could not be pronounced ; and this is likewise clear from Lord Cromarty's answer to these objections before recited ; it is therefore out of all sight to pretend, that Innes and Clark, by the foresaid answers or objections to Lord Cromarty's counter-claim, did assert that Plaids had no possession of the lands in Caithness, prior to the 1709, or that this can be held as evidence, that the rents of West Cannisby *remained* in the tenants hands down to that period.

At any rate, the alledged non-possession of Plaids could only respect the period prior to the date of the foresaid decret of declarator, or, at most, until his majority in 1702, when Lord Prestonhall's right to the ward-duties ceased. But what hindered Plaids from uplifting the rents of West Cannisby, which fell due after his majority, down to the 1709, the date of the first disposition to Innes and Clark ? He was then confessedly in straitened circumstances ; and when he had a title to possess these lands, it will not be presumed that he would neglect to do so, and suffer the rents to remain in the tenants hands. He certainly had as good a title to possess betwixt his majority and the date of his disposition to Innes and Clark in the 1709, as Innes and Clark had to possess upon that disposition after the 1709 ; and the defender has not been able to assign any good reason, why Plaids should have allowed the rents to remain in the tenants hands, when his circumstances required his uplifting them, and when he had a title so to do.

It has, indeed, been said, that it was not to be presumed, that the tenants would pay their rents, especially after being cited in the process of declarator at Prestonhall's instance.

But this must appear a very extraordinary reason why the rents preceeding the 1709, should have been allowed to remain in the tenants hands. As the decret of declarator, at Prestonhall's instance, for Lord Cromarty's behoof, contained a personal decerniture for the mails and duties against the tenants, it was certainly a good title for uplifting the rents prior to Plaids's majority in the 1702, and as his Lordship had likewise a title to the rents of the rest of the estate, in virtue of the decret of division 1696, the presumption would be, that he likewise uplifted the rents of West Cannisby, at least, during the years of Plaids's minority. But as the

the foresaid decret of declarator was limited to Plaids's minority, it still remains to be accounted for by the defender, why the rents were not uplifted by Plaids after that period.

It hath been urged, that the said decret of declarator was intrinsically void and null: But, the petitioners do not well comprehend the meaning of this observation; for, if that decret was insufficient, for uplifting the rents *prior* to Plaids's majority, much less could it have been any bar to Plaids's uplifting the rents *after* his majority, to which it did not extend. If the defender means, that this decret interpellated the tenants from paying any rents at *all*, either prior or posterior to Plaids's majority, it must have been equally good to interpel them from paying rents to Innes and Clark, who were in no better case than Cuthbert, their author; and, consequently, if none were either paid to Prestonhall, or Lord Cromarty, the rents, not only of the lands of West Cannisby, but also of the whole of the rest of the estate of Mey according to the defender's argument, remain in the tenants hands to this day.

The next observation upon this head on the part of the defender, is, " That *no mortal* could have any title of intromission 'till the 21st of February 1710, when, and no sooner, the decret of " division was extracted by Innes and Clark, to *compel* the tenants " to pay their rents." But, this observation, when examined, will appear to be perfectly inconclusive, contrary to the fact, and totally insignificant. It proceeds upon the supposal, that the extract produced by the defender, was the *only* extract that was taken of the decret of division 1696; and, also, that without an extract of *that* decret, no rents could be recovered; and that, therefore, the rents must have remained in the tenants hands.

But, in the first place, it has been already shown, that there was a title in the person of Prestonhall, to recover the rents, prior to Plaids's majority. And, 2dly, supposing the extract in process, to have been the *only* extract taken out of this decret, how does this prove, that the rents of the lands of West Cannisby, from the 1694 to 1709, remained in the tenants hands? The decret of division gave not only a title to the lands of West Cannisby, but also to the whole estate of Mey, not purchased at the roup; and, if it shall be supposed, that *no mortal* had a title till February 1710, when the extract in process appears to have been taken out, then it must follow, that Lord Cromarty, who, by
this

(25)
this decret, had the greatest part of the estate in Caithness allotted to him, allowed the rents to remain in the tenants hands, from the 1694, to the time when this extract was taken out. This is the natural consequence of the defender's observation ; for, otherwise, if it shall be supposed, that another extract was previously taken out, that extract, by whomever taken, gave an *equal* title to the rents to all concerned in the division : and, as it does not appear, that any compulsitor was uted against the tenants, for payment of their rents, posterior to the 1709, it therefore cannot be presumed, that any would be necessary preceeding it. And, were it material, it appears from the disposition before mentioned, in January 1710, that Innes and Clark were specially assigned to the decret of division ; and this disposition bears, that the writings relative to the *baill* premisses, were delivered to them, conform to inventory, which must have included an extract of that decret, and shows, that the extract in process, was *not* the only extract that was taken out. It likewise appears from the decret of modification and locality, at the minister's instance, in June 1708, that Plaids was known to be both proprietor, and in possession of West Cannisby, as he is called as a defender in that procets, under the title of *Portioner of Cannisby*.

But it is unnecessary to detain your Lordships any longer upon this branch of the cause, as you must be perfectly satisfied, that there is not the least ground or probability for supposing, that the rents in question for 16 years back, remained in the tenants hands unuplifted. Indeed, any thing will be presumed, rather than that the rents remained unuplifted, during the long period between the 1694 and the 1709, a supposition extravagant in itself, and which rebels against all credibility.

If therefore the petitioners have been able to satisfy your Lordships, that there is neither evidence nor probability, that the rents between the 1694 and the 1709, remained in the tenants hands unuplifted, especially as there were so many persons, who had a title to receive them during that period, the interlocutor complained of, which finds the petitioners " liable for such of the rents of the " lands of West Cannisby, due betwixt the years 1694 and " 1709, as were payable by the tenants who shall appear to " have been in possession at the 1709," will fall of course to be altered.

(26)

And this leads the petitioners, in the second place, to examine the grounds and circumstances, upon which, according to the petitioners apprehension, your Lordship proceeded, when you pronounced the foresaid interlocutor, which, if adhered to, would still involve the petitioners in a great deal of litigation.

For, although it has been alledged by the defender, that three of the ten persons, who are said to have been tenants in the lands of West Cannisby in the 1694, viz. Patrick Swannie, Donald Williamson, and William Dunnet, continued to be tenants in the 1709, when Innes and Clark entered into possession; yet, even upon that supposition there is not the least vestige of evidence from the process of sale, what were the particular rents payable by these supposed tenants in the 1694; for, Sir James Sinclair of Mey having hindered the tenants of his Caithness estate from swearing to their rents, it appears from the proceedings in the process of sale, that the method fallen on for ascertaining the rental, was, by holding Sir James as contended, upon a rental given in by the creditors, wherein the lands of Cannisby are classed in with other parts of the estate, and stated at a general rent; so that this matter would in this view be utterly inextricable.

In the next place, the petitioners do deny, that there is sufficient evidence, that any of those persons, who are said to have been tenants in the 1694, continued to be tenants till after the 1709; their being of the same name is not sufficient evidence of the fact; and, indeed, it would seem, from the accounts and jottings, recovered from among Clerk Campbell's papers, to be afterwards noticed, that the foresaid *three* tenants could not be the same with those of the like name, who were said to have been tenants in the 1694, as there is no mention in any of these jottings and accounts, that they were tenants prior to the 1709; but, on the contrary, they thereby appear to have been counted with as tenants, whose possession commenced ~~prior~~ to that period.

Great stress was laid by the defender upon some of the accounts or clearances with the tenants, recovered from amongst Clerk Campbell's papers; and, it was said, that, in these clearances, the arrears due by the tenants are regularly stated; and, in severals of them, the *old rents* are distinguished from those of later years, from which the defender concludes, that these *old rents* were arrears of an ancient date, of which a separate account had

had been kept from the rent of later years, and that Campbell had been uplifting arrears of a long standing.

But, in the first place, the petitioners will be pardoned to say, that the conjecture is extravagant. Upon the supposition, that the rents had been owing by the tenants, as far back as the defender is pleased to suppose, which has been already shown to be without any real foundation, it cannot be believed, that two accounts would have been opened with the tenants, one for the years falling due, posterior to the commencement of Innes and Clark's right, and another for the arrears of former years; as the right was equally good for the whole rents, either bygone, or in time coming; so it is inconsistent with common sense, to suppose, that they would not have made a regular application of the money they received, to extinguish the rents that were due, and that they would never have applied a payment to the rent of a later year, if former years were due.

But, in the next place, when the accounts and clearances referred to, are attentively examined and considered, the defender's conjecture will appear to be perfectly groundless, and that these accounts prove the very reverse of what he is here pleased to suppose.

The clearances referred to, are upon one paper, printed in the appendix subjoined to the defender's information, beginning on p. 6th, and ending on p. 8th. This paper bears date the 25th of October 1716, and relates to the following six tenants, viz. Peter Swannie, Donald Williamson, Thomas Dunnet, Matthew Dunnet's relict, George Mouat, and Donald Lyell.

It begins with Peter Swannie, and contains a memorandum with respect to him, in the following words:

" At Seater the 25th day of October 1716, *Compted* with Peter Swannie in Wester Cannisby, and he paid money for five Octos of Land, Martinmas 1712, 1713, 1714, and 1715, at 9 l. 4 s. 2 d. and the victual-rent at 7 bolls, 2 firlots, for crop 1710, 1711, 1712, 1713, 1714, and he rests yet the farm, crop 1715, and the current crop 1716, and the ensuing Martinmas debt, whereon I granted receipt, allowing what he paid to the mitter."

This memorandum shows, 1st, that Peter Swannie had then *compted* for and paid all he owed preceeding Martinmas 1715 *retro* to the

1710,

1710, the time of his entry, and was resting his victual-rent, or farm, crops 1715 and 1716, and the ensuing Martinmas debt, or money rent 1716. 2dly, It is perfectly clear, that this behoved to be the first clearance with Swannie, as Clerk Campbell's authority from Provost Clark to uplift the rents, was no earlier, as appears by the letters produced, than April 1711; and your Lordships will particularly attend to this circumstance, that, in all the numerous jottings and accounts which have been recovered from among Clerk Campbell's papers, and printed in the foresaid appendix, there is not the least mention, that any rent had been due by, or uplifted from, Swannie, prior to the year 1710, which, as Campbell seems to have been very attentive in keeping accounts of the rents due by the tenants, and received by him, would not have been omitted, had he received any rents previous to that period. This last observation applies equally to all the other tenants mentioned in the foresaid clearance.

Your Lordships will observe, that betwixt the foresaid memorandum, and that which respects the next tenant, Donald Williamson, there is interjected an account printed in Italicks, which is admitted, and, indeed, appears from the face of it, to have been afterwards interjected by clerk Campbell's son. This account debits Peter Swannie with the farm crops 1715, 1716, and 1717, and, after giving credit for a payment made to Campbell himself, makes a balance against Swannie of 15 bolls, and 18 l. 8 s. of money.

The next memorandum, in the foresaid paper, relates to Donald Williamson, and is in the following words:

"Donald Williamson labours 3 film (*i. e.* farthing) for Martinmas 1712, 1713, 1714, 1715, and 1716, and pays 11 l. 1 s. money, and 9 bolls victual; he only rests Martinmas debt 1715, and 13 bolls old rests, and the farm 1715 and 1716, allowing what he paid to the minister."

It is as plain as any thing can be, that here Donald Williamson is said to be compted with for the *whole* years of his possession, beginning at Martinmas 1712; and that besides the money-rent due at Martinmas 1715, and the victual-rent crops 1715 and 1716, he owed 13 bolls of arrears for the immediate preceeding years; and, accordingly, in the interjected account, the 13 bolls of old rests are first stated, and then follows the rent for the years 1715
and

and 1716; but it would surely be a most absurd construction of the words of the foresaid memorandum, to suppose that these rests related to other years than those for which he is there said to have possessed.

The next memorandum relates to Thomas Dunnet, and is in the following words :

“ Thomas Dunnet for 5 octo's for Martinmas 1712, 1713, 1714, and 1715, at 9 l. 4 s. 2 d. and the victual at 7 bolls 2 fir-lots, for the first three years, and for an octo more for 1713, 1714, 1715, and 1716, and rests only 6 pecks of victual for *bygones*, and the farm of 5 octo's for crop 1715, and the hail of 3 fdin (*i. e.* farthings) for 1716, allowing what he paid to the minister.”

The natural and plain import of this memorandum, like the former, is, that Dunnet was *compted* with for the rent of five octos for Martinmas 1712, 1713, 1714, and 1715, at 9 l. 4 s. 2 d. of money, and 7 bolls 2 firlots of victual for the first three of these years, and for the rent of an octo more for the year 1713, 1714, 1715, and 1716, and was resting of bygones, including the crop 1715, only six pecks of victual, together with the farm or victual-rent of 5 octos, for crop 1715, and of 6 octos for the 1716; and, accordingly, the interjected account, with respect to this tenant, is stated in *that* manner.

It is further to be observed, that the six pecks of arrear, is not stated in the memorandum as old rests, but only under the general name of *bygones*, and yet these six pecks are stated under the name of *old rests* in the interjected account, which clearly shews, that *old rests* and *bygones*, were understood to be synonymous terms, and that no more was thereby understood than the rests of the years which the tenants were then specially accounting for.

The next memorandum, in the foresaid paper, relates to Matthew Dunnet's relict, in the following words :

“ Matthew Dunnet's relict laboured 5 octos for Martinmas 1712, 1713, 1714, 1715, and paid 9 l. 4 s. 2 d. and 7 bolls 2 firlots victual for crop 1710, 1711, 1712, 1713, 1714, 1715, and 1716, and still rests four bolls six pecks victual for *old farm*, and the farm 1715 and 1716.

The same observation occurs with respect to this memorandum as to the former, that here the arrear plainly arises from the rents preceeding the 1715, and is accordingly so stated in the interjected

H

account,

account, with respect to her, under the title of *old rests*.—Neither this woman, or her husband, were any of the tenants who are said to have possessed in the 1694, as their names do not appear amongst them; and as it cannot be said that the *old rests* said to be due by her, was for years in the period betwixt the 1694 and the 1709, it is demonstrative evidence, that the arrears, mentioned in these memorandums, under the name of old rests, did arise from the rents of the years therein stated, and not from rents of years which were not specified in them.

The memorandum before mentioned, with respect to this woman, does further clearly show, that it, as well as those relative to the three tenants, who are said to have been tenants in 1694, was intended to ascertain the *whole* years of their possession, and this, joined with the evidence on this head, arising from the accounts and jottings of Clerk Campbell themselves, is convincing that none of the tenants mentioned in this paper of clearances, had any possession prior to the years therein specified.

It likewise appears, from the letters wrote by Provost Clerk to William Campbell, printed in the forefaid appendix, that the provost is therein desiring him to send a particular account of the payments made to him by the tenants, and also an account of the payments made by Campbell to the provost.

Accordingly, there appears an account, debit and credit, betwixt Clerk Campbell and Provost Clark, which is printed on p. 4, of the before mentioned appendix, immediately after the provost's letters. In which account Campbell debits himself with the rents of West Cannisby for the years 1712, 1713, 1714, and 1715, and takes credit for 299 l. 5 s. 5 d. " of Cash paid to Provost Clark, " as *per* his several letters acknowledging the same," and which sum exactly corresponds with the sums mentioned to have been received in the provost's letters.

Clerk Campbell, in this account, likewise takes credit for the following article :

	B.	F.	P.	Money.
By rests of rents due by the tenants	99	0	0	75 10 0
<i>per</i> particular account.				

The particular account referred to in this article, is not produced, nor is it accounted for how this should be the only paper amissing,

amissing, when all the others appear to have been so carefully preserved; however, your Lordships will not much wonder that this should be the case, when you are informed, that the above article of rests exactly tallies with the amount of the balances arising due by the tenants, as stated in the fore said paper of clearances, thus :

	B.	F.	P.	Money.
Peter Swannie . . .	15	0	0	18 8 0
Donald Williamfon . .	29	1	0	22 2 0
Thomas Dunnet . . .	17	3	2	22 2 0
Matthew Dunnet's relict . .	19	1	2	0 0 0
George Mouat . . .	17	2	0	12 18 2
	<hr/>			<hr/>
	B. 99	0	0	L. 75 10 2

This is demonstration, not only of the construction put by the petitioners upon what is called *old rests*, but also that these rests did, and could only apply to the year 1712, and subsequent years, for the rests of which Clerk Campbell charges himself in the fore said account, and at once puts an end to the forced conjectures and strained inferences, with which the defender has hitherto attempted to mislead the court. For as Clerk Campbell, in the fore said account, does not charge himself with rests of any kind, but only with the rents of the lands for the years 1712, 1713, 1714, and 1715, so the rests, for which he takes credit, cannot possibly apply to any other years than the years contained in the charge.

The defender, sensible of the force of this evidence, has endeavoured to take off the attention of the court from it, by observing, that the general article of arrears, stated in the fore said account betwixt Clerk Campbell and Provost Clark, was the only arrear that was due from the lands, and, *consequently* (it is said) must comprehend the arrears preceeding the 1709. Pet. p. 22.

But, without any further, it is quite incomprehensible how clerk Campbell can be supposed to be taking credit out of the rents 1712, and subsequent years, for arrears due of *former* years, the rent of which had not entered into that account.—The supposition is perfectly absurd, and yet this absurdity, like many others, has been endeavoured to be maintained in this cause.

As

As your Lordships, at pronouncing the interlocutor complained of, did not suppose that Innes and Clark, or any person on their account, could be held as having uplifted rents from the tenants who were removed, or did not appear to be in possession at the date of their right, it will therefore be improper, in this application, to take notice of the many other particulars from which it is pretended to be presumed or inferred, that Innes and Clark intruded with the *whole* rents of West Cannisby between the 1694 and the 1709.

It may however be proper to take notice of an alledgeance repeated in former papers, and which may probably be introduced into the answers, namely, that in the submission before mentioned betwixt the Earl of Cromarty and Innes and Clark, the Earl did claim these rents from Innes and Clark.

But, in the first place, Lord Cromarty's assertion is not evidence, if he had really made it. But, in the next place, it is a gross mistake to say that he claimed the rents of West Cannisby from 1694 to 1709, from Innes and Clark. No such thing appears from his claim. The articles really claimed were not rents at all, but certain alledged grounds of compensation, founded upon the decret of declarator before mentioned, of the ward and marriage of Plads, the alledged vassal and possessor of the whole lands and estate of Mey, lying in Ross-shire as well as in Caithness, to which the Earl had acquired right as assignee of Lord Prestonhall. It cannot be supposed that the Earl meant to claim the rents of the whole estate of Mey from the 1681, as having been personally intruded with by Innes and Clark; that is a supposition impossible; and yet this must be supposed, otherways there is no sense in the defender's observation. Indeed, if any of the parties could have been said to have intruded with the rents, it could not be Innes and Clark, but the Earl of Cromarty himself; because, in the process of forthcoming against him at Lord Prestonhall's instance 1708, it is expressly averied that the Earl *possessed the ward-lands since Whitsunday 1694, and had continued in possession of the same*. And the averment was not denied by the Earl, for whom appearance was made in the process, as appears from an extract of the decret of forthcoming in process.

The only other thing upon this head, which the petitioners shall take notice of is, the new production that was made by the defender,

defender, with his last reclaiming petition, viz. an unsigned blot-
 ted scrawl, without a date, scored in several places, and entitu-
 led on the back, "*Double, information sent the Earl of Cromarty,*
 " 1714."—And another unsigned scrawl, said to be referred to in
 the former and entituled on the back, "*Charge Cuthbert against*
Innes and Clark, 1714."

It was said that these writings are holograph of Plaids; but
 supposing this true, the relevancy is not obvious. Plaids's *asser-*
tion, no more than the assertion of the defender in his right,
 can be allowed to establish a debt or claim against Innes and
 Clark.

At the same time it is obvious, upon comparing these scrawls
 with the letters in process, wrote by John Cuthbert, that they are
 not of his hand-writing, nor indeed of his composing, as they
 are not wrote in the first, but in the third person. But even al-
 though they were holograph of Plaids, they can never be held as
 evidence that Innes and Clark, contrary to every probability, and
 to the evidence already stated, intromitted with the rents in que-
 stion, or be allowed to create a *debt* in his favour against Innes
 and Clark. Were the petitioners to produce the holograph jot-
 ting of Innes and Clark, (which they can do) of money paid by
 them to and for Plaids, but the vouchers whereof are now a-missing
 or mislaid, and to insist that they should be considered as creditors
 to Plaids for such debts upon *that* evidence, it is believed the defend-
 er would not listen to it. The petitioners would be readily told,
 that, without production of the vouchers *themselves*, the money
 so paid could not be allowed them. And accordingly, upon the
 defender's objection, your Lordships refused to allow the petition-
 ers a debt of Plaids's, paid to one John Colly, of 153 l. Scots, be-
 cause the voucher was not *now* in process, notwithstanding that
 evidence of its having been paid had been formerly produced, not
 only in the submission with Castlehill, but in this process.

Indeed, taking these writings as they stand, the petitioners can-
 not discover that they can in the least aid the defender in the
 present question; and they must be pardoned to say, that they
 scarce believe the like was ever before offered as evidence of debt
 in a court of justice. As to the first writing, viz. the "double,
 " information sent to the Earl of Cromarty," it makes no men-
 tion

tion of Innes and Clark's intromissions in any shape. Although the paper is conceived in a very clamorous stile, yet it is void of foundation in fact, and the allegations of it are absolutely disproved by the writings, and other evidence in process; and it is observable, that it is equally clamorous against Castlehill, the defender's own father, who had got an assignation from Plaids to the back-bonds granted by Innes and Clark; and indeed Castlehill seems to be the chief object of that complaint. It appears clearly from the evidence in process, that very considerable sums had been advanced to Plaids, and for his behoof; and it is not impossible that Plaids was provoked that he was not continued to be supplied with money as he wanted it, notwithstanding it is clear that the bulk of his funds have hitherto not been made effectual.

As to the other paper, entituled, "Charge Cuthbert contra Innes and Clark," if it is to be taken as evidence of Innes and Clark's intromissions with the rents of West Cannisby from the 1694, it must by the same rule, be sufficient to prove their intromissions with the debt owing by the Earl of Cromarty, which, with the interest thereof to 1714, is therein charged as *received* by them from the Earl; and it must also be held to prove, that they had intromitted, and were chargeable with the 6000 merks contained in the bond of provision to Plaids's wife before mentioned, although that bond was never delivered to Innes and Clark, and is still outstanding as a debt affecting the estate of Skelbo. And indeed, from perusing the accounts contained in the foresaid paper, it is evident that, make them who will, they must have been made out very much at random, or that the person who made them out, must have been very ignorant of the real situation of the funds which were conveyed to Innes and Clark, because, in these accounts, the money received from William Innes for Ulbster, is stated at 2879 l. whereas, even the defender himself is forced to admit that it did not exceed 2000 l.

It would appear, from what is called *Proposals for remedy*, in the double information sent to Lord Cromarty, that the scheme was to convey the whole to the Earl, or a trustee for his behoof, upon his Lordship's advancing a sum of money to Plaids, and security

security for another sum for behoof of his daughter; and, in the view of making the proposals go the better down, it would appear, that, without adhering to truth, the person who made out the same, wanted to make the funds appear larger than they really were, and therefore he greatly exaggerated the charge against Innes and Clark.

The defender says, that in all the deeds above mentioned, taken from Plaids, Innes and Clark are specially assigned, not only to the current rents, but also to bygones, which he says is a plain confession that there were certain bygone rents then due in the tenants hands.

But this is taking for granted what ought in this case to be proven by legal evidence.

2do, The deeds themselves are above recited; and it is plain that no argument whatever can from thence arise in favour of the defender: they are conceived in the common and ordinary stile of such deeds: and indeed the clause referred to, respects the whole estate of Mey as contained in the apprisings. And,

3tio, The first deed bears date in August 1709; so that one term's rent of that crop had become due at the Whitsunday preceeding; and therefore these deeds might with great propriety have assigned Innes and Clerk to rents then due, without supposing that one farthing of crop 1708, or any preceeding crop was in arrear.

The petitioners are therefore humbly persuaded that your Lordships will be of opinion that the defender can receive no aid in this question from the new production; but that the cause stands precisely where it did when you pronounced the interlocutors before mentioned, of the 29th of November and 18th of December last.

And upon the whole, that it will appear to your Lordships, that so far from there being sufficient legal evidence in this case to establish a claim of debt against the petitioners, upon account of Innes and Clark's supposed intromissions with the rents in question, from the 1694, in terms of their back-bonds before mentioned, that there is not even any circumstances condescended on, which create a *presumption*, or even a *suspicion*, far less that can amount to a proof, that they had intromitted with these rents: on the contrary,

contrary, it has been clearly shown, that the rents in question could not have been *resting* at the date of the right to Innes and Clark.

The defender's alledgeances upon the head, which he would have taken for evidence, are not only not proved, but on the contrary, have been all disproved in the clearest manner.

In the first place, the utter improbability that the tenants of West Cannisby should have been allowed to possess for sixteen years, without paying any rent, or that so many years rents would be allowed to remain in their hands unuplifted, when so many persons had a title to receive the same, would be conclusive of itself.

But further, 2dly, it has been shown, that not only Prestonhall, obtained his decret of declarator, and of mails and duties, against the tenants, *nominatim*, of these lands, as well as of the rest of the estate of Mey, which decret entitled him, or Lord Cromarty in his right, to uplift the rents from the tenants, at least during Plaids's minority, but also that George Cuthbert of Castlehill acted as curator for Plaids from the 1696 to the 1702, when he became major, and is admitted in that period, to have uplifted the rents of subjects which then belonged to Plaids, and appears afterwards to have taken a *general* discharge from Plaids of all intromissions and omissions whatever, chargeable upon him.

3dly, Plaids himself, after his majority in the 1702, had an undoubted title to uplift the rents of these lands. He appears too to have been in necessitous circumstances; and therefore, supposing that neither Prestonhall nor Castlehill, the curator, had intromitted with any of these rents, it is impossible to doubt that every shilling that could be got of them, would be taken up by Plaids himself. And that Plaids was in possession before the 1709, appears from the decret of augmentation and locality of the stipend of the minister of Cannisby, dated 16th June 1708, beforementioned. In that process he is called as a defender, under the title of Portioner of Cannisby. In the rental given in, the lands are said to belong to him; and part of the stipend is localled upon them, which shows he was then known to be both proprietor and in possession of them.

But, 3tio, that these rents were not resting at the date of the disposition to Innes and Clark, and that they had no intromission therewith, is strongly confirmed from the circumstance of there being *no mention* made in the accounts and jottings recovered from among the

the papers of Clerk Campbell (who appears from these accounts to have been abundantly exact) of any intromission prior to the 1710: and when, Lastly, to this is added this other material circumstance, that John Cuthbert of Castlehill, the petitioner's father, who got a conveyance in the year 1713, to the back-bonds granted by Innes and Clark, when he brought his action in the 1732, against the representatives of Innes and Clark, and Sir Patrick Dunbar, to account for their intromissions, only concluded against them for the rents of West Cannisby, for *Crop 1711 and downwards* they all afford the strongest negative evidence, that can be well imagined in any case, that Innes and Clark had no intromission with the rents of these lands, which fell due prior to the date of their right in 1709.

MAY it therefore please your Lordships, to alter your interlocutor of the 28th of February last, and to find, that the petitioners are not liable for any of the rents of West Cannisby, from the 1694 to the 1709.

According to Justice, &c.

R. J. MACQUEEN.



A N S W E R S

F O R

ALEXANDER CUTHBERT, Esq;

T O

The PETITION of Mrs Elisabeth Dunbar, lawful daughter and universal disponee of the deceased Sir Patrick Dunbar of Northfield, and James Sinclair of Duran, Esq; her husband, for his interest.

SIR James Sinclair of Mey being incumbered with debts, his estate was brought to a judicial sale in 1694, when the greatest part of it was purchased by the Earl of Cromarty, for behoof of the heir of the family; but as the residue of the estate did not find a purchaser, what remained unfold was parcelled out, and divided among the creditors, in proportion to their debts.

Alexander Cuthbert, provost of Inverness, being of the number of these creditors, his interest was produced in the ranking; but he happened to die *pendente processu*. His nephew and heir, John Cuthbert of Plaids, was an infant at the time; and Provost Cuthbert's interest was ranked for its proportion of the price of the lands purchased by Lord Cromarty, and the lands of Wester Canisby allotted to that interest in the division of the unfold lands, not in name of any particular person, but of Provost Cuthbert's representatives in general.

That the tutors or curators of John Cuthbert did not intromit with the rents of these lands, is certain, as will appear from the sequel; and it is admitted, that they did not receive from Lord Cromarty the proportion of the price of the lands purchased by

A

him,

him, for which Provost Cuthbert's representatives were ranked; as that debt was claimed by Mrs Jean Hay, the widow of Cuthbert of Castlehill, upon the late Earl of Cromarty's forfeiture, as a debt affecting that estate; and the claim was sustained by judgement of this court.

From the tutorial accounts it appears, that the tutor had never obtained possession of the lands of Cannilby, nor had any intromission with the rents of these lands. Lord Cromarty retained that part of the price for which the debt due to Provost Cuthbert's representatives had been ranked on his purchase; and as Provost Cuthbert's infant heir was the only person who could have a title to intromit with, or discharge, the rents of Cannilby, these were allowed to remain in the tenants' hands from the 1694 to the 1759; and several of the tenants, possessors of these lands in the 1694, continued in possession of their respective farms down to the 1759, and for several years thereafter, in good credit, and made punctual payment, both of the current rents, and any arrears they were owing.

John Cuthbert of Plaids, the heir and representative of Provost Cuthbert his granduncle, being naturally facile, weak, and indolent, and in that respect improper to be intrusted with the management of his own affairs; and being at the same time incumbered with some debts, for the payment of which provision behoved to be made, was prevailed upon, by deed of this date, to grant a faculty to Robert Innes of Mondole, and Alexander Clark, one of the bailies of Inverness, whereby he constituted them "his very lawful factors, attornies, and special errand-bearers, for meddling, intromitting with, and receiving, all debts and sums of money whatsoever, and others, any manner of way due and adducible to him, whether heritable, real, or moveable; particularly, and but in prejudice of the foresaid generality, the following articles."

1st, What sums were due to him by the Earl of Cromarty and Sir James Sinclair of Mey; alluding to the debt affecting the estate of Mey, and ranked upon the price of that part of the estate which had been purchased by Lord Cromarty. 2nd, What was due by the tenants and possessors of Cannilby; which, your Lordships will observe, could only mean and intend the bygone rents for crop 1758, and proceedings, as it had no relation to the rents of any after years, but altogether those that were then resting owing by the tenants of Cannilby; and as again expressed in an after clause

clause of the same deed, all sums of money, and others whatsoever, any manner of way due, *resting and indebted to the said John Cuthbert by all and every one of the above-designed debtors and tenants.*

Of the same date, Innes and Clark granted backbond, obliging Aug. 15. 1709 them, their heirs, executors, and successors, *to make just count, reckoning, and payment, of what sums of money they should happen to recover "from all or any of the above-designed debtors and tenants, by "virtue of, and upon, the aforesaid right; deducing always, and allowing in the first place, all and whatsoever debts they should "happen to procure right and title to, due by the said John Cuthbert to whatsoever person or persons, with all necessary and contingent charges and expences that they should happen to deburse, "and give out, in the said affair; with a competent salary for their "own pains and travel in negotiating and managing his said affairs; "thereby declaring, that what debts should be acquired from any "of the creditors of the said John Cuthbert, which they should "pay and purge by his own effects, any composition which they "might happen to procure upon such payment, the same should "truly and effectually redound and be communicate by them to "the said John Cuthbert himself, and his forefairs."*

Innes and Clark do not however appear to have ever seriously intended the fair execution of the trust they had thus undertaken. Their private affairs were then *derangé*, and a sum of money was what they had immediate occasion for. In this view, as the subjects particularly above mentioned were most likely to answer that end, or to be a fund of credit, they easily persuaded the poor weak man to execute an assignment of the premises in their favour.

Accordingly, by deed of this date, proceeding upon a false and affected narrative of its being granted for onerous causes, Plaids fold, disposed, and assigned, to them, their heirs, &c. the apprisings which he had against the estate of Mey, with all right, title, or interest, he or his predecessors had thereto; and particularly, but prejudice of the foresaid generality, any share, part, or portion, of the said estate of Mey, allocate and set apart for the said John Cuthbert by the Lords of Council and Session in the decret of sale of the same, passed in the year 169 , and the security given therefor by George Earl of Cromarty, *or whoever else was the purchaser*, principal, annualrents, and penalties, therein contained, O.S. 21. 1709.
with.

with the lands of Easter (by mistake for Wester) Cannisby, in the shire of Caithness, also destinate by the said Lords for a part of the payment of the sums contained in the foresaid appraisings, with the mails and duties thereof, bygone and to come.

1701.21.1750.

This also was qualified by another backbond of the same date; whereby, upon a recital, that the same was only a trust put upon them by the said John Cuthbert, *in order to satisfy and pay his debts, and manage his affairs, upon the terms and conditions under written*, they bound and obliged them, their heirs, &c. *to make just count, reckoning, and payment, to the said John Cuthbert, his heirs, &c. of any sum or sums of money, which they, or any of them, should receive from any person by virtue of the disposition and right before mentioned; provided, that out of the first and readiest of any sums of money arising, or to be received, they are allowed to retain in their own hands as much thereof, as will completely satisfy and pay them all and every debt and sums of money due by the said John Cuthbert, already satisfied and cleared by them, or which they should have satisfied and cleared thereafter, conform to the rights of the said debts, to be granted by his creditors to them; and likewise for all sums advanced, or to be advanced, to John Cuthbert himself, or to be expended in recovering and making effectual the subjects disposed, and for their personal charges, and a competent salary for their own pains.* And by this backbond the trustees became further bound *to bring the subject of the foresaid appraisings against the said estate of Mey, with what ensued thereupon, to a period and conclusion, by a friendly agreement with the Earl of Cromarty, betwixt the date thereof and the* day of 1710; *or else, if the said Robert Innes and Alexander Clark could not agree therein, to intent a legal process against all parties concerned, and prosecute and follow forth the same until the final end thereof.*

From which your Lordships will perceive, that as the bygone mails and duties of the lands of Cannisby, as well as those to come, was one of the special subjects thereby assigned in trust to Innes and Clark, to be applied for compounding the debts due by Maid, they not only undertook to do the proper diligence for making them, and the other subjects of the appraisings against the estate of Mey, effectual within a limited time, but stipulated payment of a competent salary for their pains and trouble, and payment of their personal charges.

But as this deed was deemed so far defective, as it contained no
procuratory

procuratory of resignation, nor precept of seisin, they took from him, of this date, a third deed; whereby, after reciting the two former deeds, and that Innes and Clark were desirous to have the aforesaid subjects more specially transmitted to them, he conveyed to them particularly the aforesaid apprisings, decret of ranking and sale, sums and lands adjudged to him by that decret, with procuratory of resignation and precept of seisin, and containing an assignation *to the mails and duties for bygones, and in time coming.* And as Plaids had not been infest in any of these subjects, they, of the same date. took from him a bond for 50,000 merks; and having thereupon charged him to enter heir to his granduncle, the Provoll, they, of this date, obtained adjudication of the whole subjects and lands conveyed. Jan. 30. 1710.
June 29. 1710.

And of even date with this last-mentioned deed and bond, they granted a third backbond, much of the same tenor with the former; whereby they acknowledged, that "albeit the said dispositions, assignation, and bond, do contain and bear the same to be granted for an onerous cause, on receipt of money by the said John Cuthbert, from the said Robert Innes and Alexander Clark; yet the truth was, the same were granted to them, partly as a security to themselves, *and partly in trust, in order to manage the said John Cuthbert's affairs;* therefore they bind and oblige them, their heirs, &c. *to make just count, reckoning, and payment, to the said John Cuthbert, his heirs, &c. of any sum or sums of money they, or any of them, should receive from any person, by virtue of the dispositions and bond before mentioned;*" but qualified, as in the former backbond, that they should be allowed to retain, *out of the first and readiest of any sums of money, or mails and duties, that they shall recover,* as much as will completely satisfy and pay them all debts and sums of money due by the said John Cuthbert, already satisfied and cleared by them, or which they shall satisfy and clear thereafter; and likewise for all sums, advanced, or to be advanced, to John Cuthbert himself, expences in recovering the subjects disposed, *and for a competent salary for their own pains.* And this, as well as the former backbond, contained a proviso, That they shall only be accountable according to their intromissions, and what they shall accept, receive, or take, by virtue of the said rights; but that they shall not be liable for omissions.

Innes and Clark having thus accomplished their views in obtaining conveyances of the premises, and the rights vested in their

persons, they counteracted their trust in the grossest manner, as most of the funds recovered they applied to their own uses, neglected compounding the debts, and suffered the poor man to be thrown in jail.

Cuthbert of Castlehill, a near relation of Plaids, and at the same time a considerable creditor, moved with these considerations, was prevailed with to interpose his good offices, partly for securing the debts due to himself, and to rescue the affairs of his friend from out of the hands of these trustees. They had entered into immediate possession of levying the rents of the lands of Cannisby for the crop and year 1709, and bygone arrears, from the 1694 downwards; and in 1710, they had received payment of a debt due by Sinclair of Ulbster, to the amount of about L. 2000 Scots, and were not at the date of the first factory creditors to Plaids in any sum whatever; so that any sum which they advanced to Plaids, or to such of his creditors as they compounded with, were out of their intromissions with his proper funds.

June 17. 1712. Upon Castlehill's interposing for the above-mentioned purposes, he, of this date, obtained from Plaids a conveyance to the same subjects which had been before conveyed to Innes and Clark, and to the several backbonds granted by them, qualified by a backbond of even date, declaring the conveyance to be in security of the debts due to him therein particularly mentioned, and obliging him to account for his intromissions, after payment of these.

In the same year 1713, Castlehill, upon the title of the aforesaid disposition in his favour, brought a process against Innes and Clark to account for their intromissions, and to denude in terms of their backbond; and upon the dependence, he used both inhibition and arrestment. It was frequently renewed and insisted in, particularly in 1732, when it appears to have been revived, both against the trustees themselves, and against Sir Patrick Dunbar and the Earl of Cromarty: and though the same was never brought to a conclusion, full warning was thereby given, both to the trustees themselves, and to Sir Patrick Dunbar, who had come in the place, that they would be obliged to account for their intromissions and management; which therefore was a double tie upon them, not only to have prepared, but also to preserve a regular account of charge and discharge of their intromissions with the proceeds of the trust-subjects, and vouchers thereof.

In 1719, Clark, one of the trustees, became bankrupt ; as did Innes, the other trustee, soon thereafter : and as Sir Patrick Dunbar of Northfield was creditor to Clark in relief of certain engagements for him, he, of this date, obtained from Clark, in manifest breach of the trust he had undertaken for Plaids, a conveyance to his share of the several subjects which Plaids had disposed by the several deeds above mentioned in favour of Clark and Innes. O.R. 21.1719.

This deed proceeds upon a recital of Sir Patrick Dunbar's engagements for Clark ; that John Cuthbert had right to several apprisings and adjudications upon the estate of Mey ; that he had also a particular decret of sale and preference upon the lands of Cannisby, and was also preferred to the sum of L. of the price of the lands of Cadboll, and others, at the time of the sale of said lands before the Lords of Session, for which the Earl of Cromarty had granted bond to the said John Cuthbert ; to all which he the said Alexander Clark had particular rights from the said John Cuthbert ; therefore, and for implement of his obligation to Sir Patrick Dunbar, and for his security and relief, he thereby assigned and disposed to Sir Patrick the aforesaid apprisings and adjudications, and sums therein contained, to which the said John Cuthbert had right, together with the foresaid decret of sale and preference, and particularly the said lands of Cannisby, and the sums of whereunto he the said John Cuthbert was preferred out of the price of said lands, with the bond granted therefor by the Earl of Cromarty. It contains a special assignation to the whole writs and evidents, and more particularly to the mails, farms, and duties, *of the said lands of Cannisby*, from and after the term of Whitfunday last past 1719.

Innes, the other trustee, dying soon thereafter bankrupt and insolvent, Sir Patrick Dunbar, as in the right of Clark, was decerned executor-creditor to him, and took decret *cognitionis causa* against Innes's son and heir-apparent ; and upon Sir Patrick's death, his daughter Mrs Elisabeth Dunbar, in virtue of a general disposition from him, confirmed the sums in the foresaid decret *cognitionis causa*, and thereupon took decret of adjudication of Innes's half of the whole subjects that Plaids had disposed to him and Clark.

Castlehill granted a general disposition to his wife Mrs Jean Hay, for behoof of herself and children ; whereupon she obtained an adjudication in implement against Castlehill's heir, of all the subjects

jects to which he had right, particularly the lands of West Canisby, and sums to which Plaids was preferred in the ranking of the creditors of Mey by the decret 1694 : and the thereafter acquired from the daughter and heir of Cuthbert Plaids, a disposition of all lands, heritages, and other rights, which had belonged to her father, and a ratification of all rights and deeds granted by Plaids to Castlehill.

And as by means thereof she came in Plaids's place, both as to the lands of Canisby, which had been decreed to Provost Cuthbert's representatives by the decret of division 1694, and to the debt due by the Earl of Cromarty to Provost Cuthbert's heirs, as his proportion of the price of the lands purchased by the Earl ; so she had right to the several backbonds granted by Innes and Clark : and as Sir Patrick Dunbar, as in right of Innes and Clark, for security and relief of the debts due by them to him, could be in no better case than his authors, she was intitled to call upon them to render an account of charge and discharge of their own and authors intromissions with the trust subjects, in extinction of the debts due by Plaids, to which they had acquired right, and to the benefit of any compositions got in transacting the debts, that being the special purpose for which the subjects had been conveyed to them.

Matters thus standing, Mrs Jean Hay, the respondent's mother, in whose place he now stands, entered her claim upon the forfeited estate of Cromarty, for the debt due to Plaids, as ascertained by the decret of ranking and sale in 1662 ; in which, however strenuously contested on the part of his Majesty's Advocate, she met with no opposition from Sir Patrick Dunbar : but after she had prevailed in having the claim affirmed, after a troublesome and expensive litigation, Mrs Elizabeth Dunbar, and Sinclair of Duren her husband, for his interest, as in right of Sir Patrick her father, brought the present process, concluding to have it found and declared, That she had the preferable right to the aforesaid debt upon the estate of Cromarty, in payment and satisfaction of the debt said to be still due by Plaids to Innes and Clark.

It is unnecessary, upon this occasion, to trouble your Lordships with a minute recital of the various points that came to be disputed in the litigation which thereupon ensued ; let it suffice to observe, that it was at length finally ascertained, by repeated judgments of this Court, that the petitioner was not obliged to denude

of the debt upon the estate of Cromarty, further than as the pursuer should instruct Innes and Clark to be still creditors of Plaids.

This point being fixed, and the process thereby resolving in a count and reckoning; as it was incumbent upon the pursuers, by the regulations of court, and from the nature of their own and their authors rights, to exhibit an account of charge and discharge of their own and their authors intromissions, the Lord Ordinary made repeated orders for that purpose; which, after long evasion, at length produced a sham account and condescendence of the debts said to be due by Plaids to Innes and Clark; but without giving any credit for their intromissions with any of the proceeds of the trust-subjects, of which, being singular successors, they pretended to be totally ignorant, and to have no knowledge of their authors intromissions, particularly the rents of the lands of Cannisby prior to the 1719, when Sir Patrick Dunbar entered into possession of these lands, upon the right acquired from Clark. This, however, produced a remit to an accountant; who made his report, stating sundry points for the Lord Ordinary's opinion, particularly with respect to the period from which the pursuer should be accountable for the rents of the lands of Cannisby, viz. Whether from the 1694, when, by the decret of division, Plaids's right to the mails and duties of these lands took place? or, *2dly*, From the 1709, the date of the trust-assignment to Innes and Clark? or, *3dly*, From 1719, when Sir Patrick Dunbar confessedly attained the possession upon the right attained from Clark.

The pursuer repeatedly denied; that either her father Sir Patrick Dunbar, or any of the original trustees, in whose right she stands, had had any intromission with the rents of Cannisby sooner than the year 1719; and therefore contended, That she could not be accountable for the rents from an earlier period.

It was on the other hand contended for the petitioner, That as the original trustees, the pursuers authors, were assigned to the decret of ranking and division 1694, with all that had followed thereon, particularly to the bygone rents of the lands of Cannisby from the 1694, they must be presumed to have intromitted with the rents of these lands, and with all the subsequent rents from the 1709 to the 1719, unless they could alledge, and show, that they had been debarred therefrom, or that other persons had intromitted therewith; or that the same could not be recovered or made effectual.

July 14. 1773. But the Lord Ordinary, by interlocutor of this date, was pleased to find, " That the pursuers are only obliged to account for
 " the rents of the lands of Cannisby from Whitsunday 1719, in
 " respect the defender offers no proof of an earlier possession
 " by Innes and Clark, the original trustees, and shows no sufficient
 " cause for resting upon bare presumptions of an earlier possession;" and to which your Lordships adhered, by interlocutor
 Jan 23; 1774. of this date.

But as these interlocutors were founded singly upon this ground. That the presumptions of an earlier possession, unsupported by any proof, were not *per se* sufficient to make the pursuer accountable for the rent of these lands prior to Whitsunday 1719, the petitioner, in the after proceedings before the Lord Ordinary, demanded, and was allowed a proof of Innes and Clark's intromissions with the rents of these lands prior to Whitsunday 1719; and such proof as could then be had, being accordingly taken, and reported to the Lord Ordinary, his Lordship, by interlocutor of this
 July 7. 1774. date, found, That the defender has not brought any sufficient evidence to prove or instruct, that Innes and Clark had possession of the lands of Wester Cannisby prior to their disposition in favour of Sir Patrick Dunbar in 1719.

This interlocutor was submitted to your Lordships review, upon the evidence then in process; but upon supposition of your Lordships being of opinion with the Lord Ordinary, that these were not sufficient to instruct Innes and Clark's intromissions with these rents prior to the 1719, he prayed warrant from your Lordships, for searching the repositories and papers of the deceased William Campbell, the sheriff-clerk of Inverness, who had been factor for Innes and Clark, and levied the rents for them of these lands of Wester Cannisby, as also for recovering the account-books and other writings of the deceased Alexander Fraser, relative to his intromissions with the rents of said lands prior to said period: and accordingly your Lordships, by interlocutor of this date, allowed to the Lord Ordinary's interlocutor: but remitted to his Lordship, to grant warrant for inspection of William Campbell's papers; and to transmit to the clerk of this process what writings shall be found relative to Clerk Campbell's intromissions prior to said year 1719; and for recovering the account-books and other writings of Alexander Fraser, relative to his intromissions with the rents of these lands; and to hear parties procurators

tors upon what further the petitioner condescends upon, and offers to prove, relative to the intromissions of Innes and Clark with said rents.

In consequence of these interlocutors, a number of material papers were recovered ; particularly a continued train of letters from Alexander Clark, to the said William Campbell, from the 3d April 1711, to the 19th October 1714; and a number of accounts and jottings, mostly of the hand-writing of the said William Campbell himself, or of his son James, authenticated by William; with all which the Lord Ordinary made avifandum. And as from these there appeared the most complete and undeniable evidence of Clark and Innes having entered into possession, by levying the rents of crop and year 1709, that is, immediately upon their getting the assignment from Plaids, your Lordships, of this date, pronounced the following interlocutor. “ On report of the Lord Gardenston Or-
“ dinary, and having advised informations given in, the Lords
“ find the pursuers accountable for the rents of the lands of West
“ Cannisby, for crop 1709, and subsequent years; and remit to
“ the Lord Ordinary to proceed accordingly.” And your Lordships were pleased, of this date, to refuse a petition reclaiming against this interlocutor. Nov. 29 1770

During the recess of the Christmas vacation immediately subsequent to the date of these interlocutors, the respondent accidentally discovered, in the false bottom of an old trunk, several writings which threw much light upon the matters in controversy betwixt the parties. And accordingly, upon this new evidence, another reclaiming petition was presented to your Lordships, praying to find the pursuers accountable for the rents of the lands of Cannisby from the 1694. Dec. 18. 1770

And posterior to the presenting of this petition, the respondent having discovered, that a process of reduction and improbation was raised by the pursuers authors, Innes and Clark, against the Earl of Cromarty, who purchased part of the estate of Mey in 1710; and that a submission was afterwards entered into between Innes and Clark, and the Earl, but to which Cuthbert of Castlehill was no party; the respondent therefore made an application to your Lordships for a diligence against Mrs Dunbar's doer, and others; which, after an obstinate struggle on the part of Mrs Dunbar, was granted, and the writings called for recovered: and the

the conclusions which occurred to be material for the respondents argument, as arising from those writings, were laid before your Lordships in an additional petition.

Feb 28 1771. Upon advising both these petitions, with the answers thereto, your Lordships pronounced this interlocutor. "The Lords having advised this petition, with the answers, together with the additional petition for Alexander Cuthbert, and the answers; in respect of the new evidence produced, find the original petition competent; and find the pursuers liable for such of the rents of the lands of Cannilby, due betwixt the year 1694 and 1709, as were payable by the tenants who shall appear to have been in possession at the 1709; and remit to the Lord Ordinary to proceed accordingly."

Both parties have reclaimed against this interlocutor; the pursuer, in so far as it extends, to a certain degree, the obligation to account for the rents of the lands of Cannilby prior to the 1709; and the defender has reclaimed, because he does, with humble submission, apprehend, that the same evidence, and the same principles, which weighed with your Lordships to compel the pursuers to account to any extent previous to the 1709, should weigh with you to make them liable to account to the full extent contended for by the respondent. And in the hopes that such will be the sentiments of your Lordships, upon a reconsideration of the case, and of the evidence which has been lately laid before you, the respondent shall now proceed to support the fundamental proposition upon which the interlocutor has proceeded, in so far as it has given the respondent a further relief than was given by the former interlocutors, and upon which he flatters himself to obtain a still greater relief.

Thus far the parties will be agreed, that, in virtue of the various rights which Innes and Clark derived from Cuthbert of Plaids, they were undoubtedly *in titulu* to exact and levy from the possessors of the lands of Cannilby, whatever rents were in their hands in the year 1709, the period when those rights did first commence, and therefore, as the foundation of the whole argument, the natural course of those answers is, to begin with examining the considerations in the reclaiming petition for the pursuers, offered by them for the purpose of inducing your Lordships to believe, that the rents had not been allowed to lie unapplied

in

in the hands of the tenants of Cannisby, from the 1694 down to the 1709.

A great noise is made, in general, by the pursuer, as to the improbability, and even incredibility, of the tenants being allowed to possess their rents unuplifted for a period of no less than fifteen years. But, with great submission, all this is mere clamour, without sense or meaning, unless the pursuer shall clearly take off the force of the observations which have been made to show the improbability of their being uplifted : for surely it is not so improbable, that tenants should refrain from paying rents, when there was no body *in titulo* to exact them, as that they should be paying them, when it is evident, from the circumstances of the estate, not only that no person had a compulsitor to exact payment, but likewise that there was such interference amongst different parties, as did in a manner put it out of the power of the tenants to pay. And the respondent does contend, this is clearly established to be the situation of the estate of Cannisby during the whole period from the 1694 down to the 1709.

The pursuer does not pretend, that Sir William Sinclair of Mey, the former proprietor, was *in titulo* to demand the payment of those rents : For if he either had such a title, or had levied them without a title, it would be a circumstance conclusive against the petitioner ; for it is incredible, that Innes and Clark would have been so very attentive to recover the pittance of the bygone teinds from Sir William, and at the same time overlook altogether the recovery of the stock, if intromitted with by him. The petitioner, therefore, is pleased to have recourse to another hypothesis ; and he supposes, that, previous to the majority of Cuthbert of Plaids, in the 1702, the rents were levied by the Earl of Cromarty, or Mackenzie of Prestonhall, for his behoof, in virtue of the gift of non-entry and ward, and declarator consequent thereupon, taken in the name of Mackenzie of Prestonhall, for behoof of the Earl of Cromarty, in order to found him in a plea of compensation against a debt due by the Earl to Cuthbert of Plaids ; the one being the purchaser, and liable in the price, and the other a creditor upon the estate, and as such intitled to a proportional share of the price. And again, with regard to the rents from the 1702 down to the 1709, the pursuer would suppose, that these were uplifted by Cuthbert of Plaids himself, being at that time arrived at majority. But it will not require many words to satisfy your

Lordships, that both the one and the other of these hypotheses is untenable, and in every respect more improbable, than that the tenants should keep possession of their rents, when there was none in a capacity, with force and efficacy, to demand them.

With regard to the first of the pursuer's suppositions, the respondent does not deny the gift of the ward and non entry duties, which was procured in the name of Mackenzie of Prestonhall; neither does he deny, that a declarator was intended in consequence thereof; he likewise admits, that the tenants were called as parties in the decret of declarator. This process was commenced as early as the 1696, and insisted in during the years 1698 and 1699; but it will likewise be admitted, that a vigorous defence was maintained by Cuthbert and his curators, who raised and insisted in a counter process of aliment: which processes were never brought to a conclusion; nor indeed was there any calling or step of procedure from the 1699 to the 1701; at which time, although the cause was unfinished, and ordered to be continued in the roll, and a reclaiming bill afterwards given in, a most irregular extract was taken out, for the purpose of laying the foundation for a collusive decret of forthcoming, afterwards obtained before the sheriff of Edinburgh, at the instance of Prestonhall, against his brother Lord Cromarty, as debtor to Plaids. And in this situation matters remained till 1702, when Cuthbert of Plaids granted the factory and trust right to Innes and Clark: the first of which is dated so soon as the 15th of August 1702.

Thus your Lordships will perceive, that notwithstanding the gift of non-entry and ward-duties, and notwithstanding the process of declarator raised in consequence thereof, Mackenzie of Prestonhall was vigorously opposed, and never made his right effectual, except by having prevailed with some extractor, to give him out this irregular and unwarranted extract. It is not, however, so much the irregularity of the extract, as the date of it, to which the respondent begs the attention of your Lordships in the present argument: for as it was not earlier than the 1702, it is, with submission, decisive against the petitioner's hypothesis, that the rents between the 1694 and the 1702 were levied by Mackenzie of Prestonhall. The only particular in this declarator meriting the attention of your Lordships in this case, is the circumstance agreed upon by both parties, namely, that the tenants upon the estate of Cannithy were cited in the process of declarator; and of consequence,

consequence, although the declarator was ineffectual to establish Prestonhall's own right, it was fully sufficient to interpel the tenants from paying to any other.

Under this branch of his argument, the petitioner throws out an insinuation, not only that the decret of declarator at Prestonhall's instance was a title to uplift the rents prior to the 1707, but likewise that Lord Cromarty had a title to the rents of the rest of the estate, in virtue of the decret of division 1696; and therefore the presumption is, that he likewise uplifted the rents of West Cannisby, at least during the years of Plaids's minority.

But it is extremely obvious, upon the most superficial attention to the matter, that these two branches of the petitioner's argument are contradictory to each other. For it is impossible that two titles so incompatible with each other, as the decret of division and the decret of declarator, could both of them be a good title to exact the rents from the tenants. If the one was a good title, the other could not. But in fact none of them were. This has been already proved with regard to the decret of declarator; and it requires no words to prove it with regard to the decret of division; which, at the same time that it establishes the Earl of Cromarty's right to the rest of the rents of the estate of Méy, clearly shows that he had no title to the rents of West Cannisby.

The petitioner likewise says, That there was nothing to hinder Castlehill, the curator of Plaids, from uplifting the rents of the lands from the 1694 to the 1702. But, independent of the observations immediately to be offered with regard to the incredibility of these rents being uplifted, either by Plaids himself, or his guardian, on account of the interpellation given to the tenants by the decret of declarator, the respondent must, in passing, be permitted again to observe upon the inconsistency of the petitioner's method of arguing. Surely nothing can be more so, than with one breath to argue that the rents were uplifted by Prestonhall in virtue of his decret of declarator, and with the next breath to contend, that they were uplifted by Plaids, or his curator, in virtue of the decret of division; for these two rights are perfectly incompatible with each other, and therefore could not have an existing force at one and the same time.

And this leads the respondent to take notice of the other branch of the petitioner's hypothesis, namely, That from the 1702 till the 1709, the rents may have been levied by Plaids himself, who at that

then time was arrived at majority ; which hypothesis is, with submission, inadmissible on a variety of accounts.

In the *first* place, The parties seem to be agreed, and the variety of rights granted by Plaids tend to prove, that he was of a weak, indolent, and facile disposition ; with which it is highly inconsistent to suppose, that when the tenants were interpellated by the citation in the declarator at the instance of the powerful family of Cromarty, that this poor, weak, indolent man, would be in a capacity, without any active title in his own person, to force his new tenants of Wester Cannibby to disregard the interpellation given them by Prestonhall's citation.

2dly, Suppose he had been ever so well qualified to do so, he had not a right in his person upon which he could have done it : for it is obvious, that the interest of Provest Cuthbert was set off in such a manner in the decret of division, it could give no particular person a right, without doing something more to prosecute that interest. It is in general a right set off *to the representatives of Provest Cuthbert* : And accordingly your Lordships will observe, that the very first act of Innes and Clark, after they got their rights, was to make up titles in the name of Plaids, by a general service, as heir to his granduncle, and an adjudication upon a trust-bond, being sensible that all their operations would be ineffectual till once these preliminary steps were taken.

3dly, Supposing that your Lordships could believe that the decret of division would vest an active title in the person of Plaids to levy the rents from the tenants of Cannibby, there is evidence, that the decret of division never was extracted for Plaids behoof, till it was done by the trustees upon the 21st February 1718, as appears from the decret itself in process.

The petitioner, conscious to himself of the decisive nature of this fact, as tending to prove, that no mortal, till the 21st of February 1718, was intitled to compel the tenants to pay the bygone rents from the 1694, strains hard, by a variety of conjectures, to get the better of it.

He says, Who knows but that the tenants would pay without extracting the decret of division. But the incredibility of such a conjecture is submitted to your Lordships without any argument, when you take into consideration, the circumstance which has been mentioned of the interpellation given the tenants by Prestonhall's citation. Nor is there any force in the petitioner's observation, when

when he says, that the interpellation was equally good to prevent the tenants making payment after the 1709, as before; although it is evident that after that period they did make such payment to the trustees: for in making this observation, the petitioner does not observe, that the trustees were in a very different situation from what Plaids himself formerly was, in respect they had not only brought an improbation of Prestonhall's declarator, and all Lord Cromarty's other grounds of counter claim, but were likewise in possession of the extracted decret of division, and completed their own and Plaids's right thereto, by serving him heir in general to his grandfather; thereafter leading an adjudication at their instance against him, upon a trust-bond. A

The petitioner next endeavours to show, that in fact the decret of division was in the possession of Plaids, previous to the extract of the 21st of February 1710; and in proof of this, he refers to the clause of delivery in the disposition 30th of January 1710, whereby Clark and Innes are assigned to the *baill* writs and evidents of and concerning the premisses, conform to an inventory thereof apart; so that as the decret of division is specified in that conveyance, an extract of the decret must have been delivered.

But this observation is not only inconclusive in itself, but discredited by contrary proofs.

It is inconclusive; for Innes and Clark being assigned to Plaids's interest in the decret of division, in which no doubt he had an interest, does not in the smallest degree prove, that an extract of the decret of division was likewise delivered to them. The decreets of ranking and division, and all interest Cuthbert had in them, are assigned only in the general; but the date of the decret of ranking is blank, and no date of the division pointed at: whereas, on the other hand, the particular adjudications, charters, and indentments, being the writs said to be delivered up, are specially recited; so that no solid conclusion in the petitioner's favour can be drawn from this general clause of delivery, which is in common style.

But further, the supposition of Plaids being formerly possessed of an extract, and delivering it to Innes and Clark in the 1710, is discredited by contrary proofs. For, in the *first* place, your Lordships will be informed, that at the date of the first factory in August 1709, there was an inventory of writs relative thereto, which has been recovered and produced in this process, and is the only one that has appeared relative to any of the deeds: But in that inventory there is no such thing as an extract of the decret of divi-

son mentioned; which is demonstrative evidence, that at that time Plaids was possessed of no such extract, or certainly he could never have failed to deliver up to the trustees his title to the capital subject which was to fall under their administration. And,

2dly, Another conclusive circumstance against the supposition of an extract being delivered along with the disposition 30th January 1710, arises from the date of taking out the other extract, being upon the 21st of February 1710: For how is it possible to conceive, that if Innes and Clark had got an extract of the decret of division delivered them upon the 30th January, they would be taking out another extract, at the distance of only twenty-two days thereafter?

The petitioner further says, That the respondent's argument runs your Lordships necessarily into the absurdity of supposing, that the whole rents of the estate of Mey were allowed to remain in the tenants hands from the 1694 downwards, if it be supposed that the extract upon the 21st of February 1710 was the first extract of the decret of division; for the decret of division respects not only the rents of Cannisby, but the rents of the whole estate of Mey purchased by the Earl of Cromarty.

But this, with submission, is a most extraordinary observation, and *totally insignificant*, to use the language of the petitioner. For in what manner does it follow, from an extract not being taken out by Plaids, or for his behoof, sooner than the 1710, that no extract was sooner taken out by the Earl of Cromarty? The Earl of Cromarty was certainly not obliged, and from the situation they were in would not be the least inclined, to communicate the benefit of his extract of the decret of division to Plaids and his curator, with whom the Earl, or at least Prestonhall for his behoof, were engaged in disputes about those very rents in the counter-processes of declarator and aliment respectively maintained by them.

Another argument made use of by the petitioner, to show that Plaids was both proprietor of, and in possession of West Cannisby, previous to the extract in the 1710, is a decret of modification and locality, at the minister's instance, in June 1718, where Plaids is called as a defender, under the title of *partener of Cannisby*.

But this argument is equally inconclusive as the last. There is no doubt that the representative of Provost Cuthbert, who was known to be Cuthbert of Plaids, was *partener of Cannisby*, upon making effectual the right arising from the decret of division. And that is all that can be drawn from his being described por-
tioner

tioner of Cannisby in the minister's decret, in which your Lordships know it is usual to call every person, however remote his interest. But this no wise proves the only conclusion of any importance in this argument, viz. that Plaids was in possession of the rents of Cannisby.

In opposition to the petitioner's supposition, of Plaids himself being in possession of the rents, it remains to bring to your Lordships recollection, the proceedings in the submission betwixt the Earl of Cromarty and Innes and Clark; where the last, on the one hand, founds upon his right to the rent as a counter claim, or an article of compensation; and, on the other hand, Innes and Clark object the nullity of the decret of declarator, "in respect no personal decerniture could have been against young Mr Cuthbert, for the rent of the lands in Caithness, because he had neither possession nor intromission."

The petitioner says, That this is only a repetition of the defences in the decret of declarator 1698; and therefore, at no rate, can go further than to prove, that Plaids was not in possession at that time.

The respondent shall not consume your Lordships time with entering into an unnecessary altercation; and therefore shall push the evidence arising from the proceedings in this submission no further than the petitioner's own concession, namely, That Plaids had no possession or intromission in the 1698. But then it will likewise be adverted to, that when this is once established, it corroborates every other presumption which the respondent has argued in this cause; for if there was no possession or intromission in virtue of the decret of division, previous to the 1698, when there was no gift or declarator, it is incredible that Plaids would get into possession after that period, when the tenants, by means of the citation in the declarator, were interpellated from the payment of their rents.—And therefore this submission affords good evidence for the respondent against the petitioner in two respects. *First*, It shows that the Earl of Cromarty was not in possession, because he is claiming the rents from Innes and Clark: and, *2dly*, It proves that Plaids was not in possession; for otherwise the averment of Innes and Clark to that purpose would not have stood uncontradicted by the Earl.

Having thus shown, that no person whatever was *in titulo* to levy the rents from the 1694 down to the date of Innes and Clark's rights; and that every presumption tends to strengthen the belief

that the rents remained in the tenants lands during that period ; it will be satisfactory to your Lordships likewise to hear the parole-evidence upon the subject, which tends to corroborate, and is itself corroborated by, every observation which has been hitherto made. Thus George Muat, one of the petitioner's own witnesses, depones, " That the deponent heard some old tenants " in the lands of West Cannistby, particularly Peter Swanie and " Thomas Dunnet, say, That there were for several years that " they paid no rent out of these lands ; they mentioned seven or " eleven years, the deponent does not recollect, which was before " Sir Patrick Dunbar got the possession." And Mr James Brodie, minister of Cannistby, depones, " That he heard some of the tenants, and some other people, make mention of Innes of Borlum, Cuthbert of Castlehill, and Provost Clark, as having had " some connection with these lands before Sir Patrick Dunbar's " time ; and that the deponent heard them say, that, for a certain number of years, which some of them called eleven, some " thirteen, and one of them sixteen years, that they paid no rents, " which was likewise before Sir Patrick Dunbar's time." That these years, during which they paid no rent, must have been before 1709, when Clark entered into possession, is plain from the clear evidence in this cause, of his regularly uplifting the rents by a factor, from his entry to 1719 ; and which proposition is now established and final by your Lordships interlocutors.

The fundamental proposition of your Lordships interlocutor being thus established, that the rents in question betwixt the 1694 and 1709 remained unplifted in the hands of the tenants, it seems absolutely impossible to resist the justice of your Lordships interlocutor, so far as it goes, in favour of the respondent. For if it appears, that the tenants in possession during those years when the rents were unplifted are allowed to continue in possession after the entry of Innes and Clark into the management of these affairs, it would be contrary to all reason to suppose, that they would be allowed to continue that possession without paying up their arrears of rents. But as the respondent, in his reclaiming petition, has endeavoured to satisfy your Lordships, that not only those tenants whose names are the same, but likewise all the rest of the tenants, or at least their heirs or relicts, must likewise have been in the possession in the 1709 ; because there was no body *in statu* to remove them ; so the respondent flatters himself, the

the same justice which has interposed so far to give relief, will go still further, and find the pursuer liable to account for the rents of all the tenants : And, in this view, the respondent proceeds to support the principle of your Lordships interlocutor, as going to the whole rents, which is the view in which the petitioner has laboured so much to impugn it.

And the respondent must begin with correcting an erroneous view which the petitioners have all along endeavoured to give of the situation of Sir Patrick Dunbar and themselves in his right. They have been pleased to assume the character of singular successors, and, on every occasion, to plead the favour which the law gives to that character. But this, with submission, is untenable. Sir Patrick Dunbar contracted upon the faith of no record, nor upon any title which is now impugned upon the ground of latent incumbrances ; but he was in the full knowledge of the right of his authors : He contracted with them in the knowledge of the rights they had, and of the obligations they were under. The very action he now pursues, is an action in their right as trustees ; and therefore to argue, with one breath, that he is so far a factor and trustee in their right, as to be intitled to the articles prestable to them, and at the same time to argue, that he is to be considered as a singular successor as to all the obligations prestable *by* them, is a method of playing fast and loose inadmissible in a court of a law. Sir Patrick Dunbar was known to be a man of much sagacity, and singular discernment, and could not fail to see, that the rights he derived from Innes and Clark, were liable to canvassment by Plaids, or any in his right, and would not fail to possess himself of every account and information which they could give ; so that there can be no doubt of his being in an equal capacity with them to stand the test of the scrutiny which is now made.

This leads the respondent to take notice of another debate into which the parties have got, as to the shape of the cause, whether the one or the other is properly maintaining a claim of debt against the other. As to which, your Lordships will readily perceive, that parties may argue upon this point in a circle, so long as they please, Perhaps, in propriety of language, they fall to be considered in the light of counter-claimants. But, without entering into critical discussions of that kind, the object of your Lordships consideration will be, What the justice of the case, and the rights of the respective parties, calls upon you to decree.

And, in this view of the matter, it is an agreed point, that the pursuers are now maintaining the present action against the respondent, in virtue of the trust which was conferred upon Innes and Clark, and are pleading, that they still remained creditors to Fluids, in consequence of that trust. Such being the state of the action, all that the defender contends for is, that they shall at the same time show an account of their management as trustees; because their management was so long, and their intromissions must have been so great, it is presumable that all their debursments in the trust-management was out of their intromissions with the subjects of the trust. And which presumption is much strengthened, by the consideration that Innes and Clark were not in a situation to be making debursments out of their own pockets: nor does the different deeds granted suppose that they were; for it is said, that they are to be allowed *retention* of their debursments *out of their intromissions*; plainly supposing, that they were not to be in advance.

The respondent is advised, that the observations now submitted are founded in material justice, and in those established principles of law uniformly applied to every case where the subject of consideration is a trust-management, or indeed any management, where one has intromission with the effects of another. But the matter does not rest upon general principles; for here the particular and express obligations in the deeds warrant the respondent in every demand he now makes.

For Innes and Clark are expressly taken bound to account for their intromissions; which expressly supposes, that they are to keep a regular account: and till that is done, the rule of law, and the presumption of *onus habet*, must meet any claim founded upon the trust-management, *presumption juris, et de jure*, so long as that essential requisite of a trust management is wanting.

Again, the precise obligation in the second backbond is to *bring the subjects of the appraisings up and the state of M^y, with what ensued thereon, to a conclusion heretofore and the* 1710,
or to raise a process again^d all concerned. That these lands, and by-gone rents of them, were part of the subject of these appraisings, and what ensued thereon, is manifest: so that unless the pursuer shall shew in what manner he has implemented this obligation, or shall give some account of these by-gones, which are proved to have been in the tenants hands at the time of their right, they cannot

cannot be allowed to come and plead any thing in their own favour in consequence of the trust-right, or to have any claim sustained to them as arising from it.

It is in vain to plead upon the clause relieving from being liable in omissions. The import of such a clause is well understood to relieve the person acting under it from being liable for every inaccuracy and oversight, which perhaps a wiser or more prudent man might have done in the management of his own affairs. But it would be a most extraordinary construction of such a clause to say, that it relieved from all obligations whatever, even the most express ones specified in the deeds; which construction is necessary for the petitioners in this case, if they are to be allowed to maintain their present action, without giving any account of these bygone rents for such a number of years; which they were undoubtedly intitled to uplift, and were bound to have uplifted, at the time they entered upon their management.

And there is greater reason for giving force to the presumption of *intus habet* in this case, when your Lordships attend to the reluctance of the trustees, and their successor Sir Patrick Dunbar, to submit to a count and reckoning; which could arise only from the consciousness, that they were satisfied and paid by their intromissions, and were willing to let things stand as they were. For although Castlehill called them to account, first in the 1713, thereafter in the 1720, and again in 1732, and that his son renewed the same action in 1734, in which it seems he intended to have proceeded seriously, yet no accounts were ever exhibited; but, on the contrary, Sir Patrick Dunbar, sensible that an accounting would probably put an end to his claims, and oblige him to surrender the lands of Cannisby, raised a reduction and improbation of Castlehill's rights in 1734, in order to meet his action of count and reckoning, and cut off the foundation of it: and these were the processes which gave occasion to the after submission, which also broke up without any decision, or without exhibiting any accounts, but objecting to each others grounds of debt. And from thenceforward it does not appear, that ever Sir Patrick Dunbar took any one step against the Earl of Cromarty, or any other. He was reputed one of the most sensible men in the north of Scotland; and in whatever light the petitioner may now see it for her interest to represent him at the latter period of his life, it is a notorious fact, that he retained his judgement to the last, but
thought

thought himself well off if he was allowed to keep the peaceable possession of the lands of Cannisby.

The petitioners talk of steps taken by Sir Patrick Dunbar for recovering the money; and particularly of a submission in the 1733 with the Earl of Cromarty, in which Castlehill was a party. But your Lordships can pay no regard to such an allegation, as no evidence is produced; and if there was any such submission, the petitioners should produce it, as the respondent is afraid of no light that can be thrown upon this cause.

Upon the observations already offered, the respondent does humbly conclude, that, independent of the particular circumstances which occur in this case, every general presumption of law, and every rule of justice, concur in debarring the petitioners from maintaining their present action, without holding them liable for the rents from the 1694, and 1709, unless in so far as they shall show, by a proper account of management, that they were debarred from recovering all, or any part of them.

But further, the respondents, in aid of the general presumptions of law, will submit to your Lordships the satisfactory grounds there is to believe that *de facto* Innes and Clark did in-tromit with the rents during that period which they are now refusing to hold count for. And,

1st, It being now established, that these rents must have remained unlifted in the tenants hands, there is an absurdity in supposing, that Innes and Clark, who got a right to the by-gones, would not recover those by-gones. They had no temptation to do otherwise, unless your Lordships shall presume, without the least reason or probability, that they meant to leave them in the pockets of the tenants themselves, who surely had no claim, either in justice or equity, to such a favour.

2^{dly}, However unfaithful the trustees might be as to the proper application of the funds, there seems no reason to doubt in their activity to recover them; for they proceeded immediately, not only by attacking my Lord Cromarty by reduction and im-probation, submission, &c. but also by taking proper measures against William Innes, whereby they recovered his debt, and by immediately extracting the decret of division, and attaining possession of the lands of Cannisby, the only other subject-matter of these appraisings. Thus they proceeded rigorously to recover every article they were bound to by the obligation in their backbond;
except

except it shall be supposed, that they allowed the bygone rents of Cannisby to slip through their fingers, without the least inquiry or concern about them; which is not only highly improbable in the circumstances in which they stood, but contrary to the express words of the obligation they had come under.

3dly, There is positive proof, that the trustees were attentive to the prosecution of the bygone rents. It appears from the letter of the 3d of April 1711, N^o 1. in the appendix to the respondent's former information, that, previous to that period, Clark had been amongst the tenants of Cannisby: and so soon after as the 7th of May 1711, he writes to Campbell the factor, "I'll send you instructions against the 1st of June, for prosecuting the bygone rents." At this period there could be no such bygoners since Clark and Innes's entry in the 1709, as to create any alarm, or to call for such an immediate prosecution; and therefore these bygone rents, mentioned in this letter of the 7th of May 1711, can relate to nothing else but to these *bygone rents*, or *old rents*, which are the subject of the present argument.

4thly, This leads the respondent to take notice of the expression of *old farm*, and *old rents*, which occur in the memorandums of Mr Campbell the factor, the evidence of which, the petitioner labours with so much eagerness to impugn. But the respondent believes; upon a consideration of his observations, the evidence of the intromission of the trustees with those old unuplifted rents, will still occur to your Lordships in a very strong point of view. The expression itself of *old rents* is remarkable, and tends to convey an idea of bygoners of an older standing, than merely the arrears of a former crop. As, however, the petitioner endeavours to show, that these expressions relate only to arrears due upon some of the years betwixt the 1712 and 1716, his observations, so far as they appear to have any weight, shall be examined. And,

1st, As to what is said, that these memorandums do clearly respect the whole years from the commencement of the possession of the tenants therein mentioned, the respondent denies, that there is any one word in any one of these memorandums to justify any such observation. From the letter of the 3d April 1711, already mentioned, it appears, that Clark himself had been among the tenants of Cannisby; and, in all probability, either by himself, or by the hands of his factor, had recovered the greater part of the rents of the former years: so that these jottings and memoran-

dums fell naturally to mention only the state of the rents from the 1712 downwards.

But further, not only the decret of sale, where the names of the tenants are mentioned, but the letter of the 7th of May 1711, makes mention both of Patrick Swanie and Williamson; concerning both of whom the jottings or memorandums are: and therefore it is clear, that although these memorandums begin with the year 1712 as to the money-rent, there is no ground from thence to presume, that their possession began at that time: And even the observation is refuted by the memorandums themselves; for several of them make mention of the victual-rent for crop 1710 and downwards: and surely the petitioners will not maintain so contradictory an argument, as to say, that the commencement of the possession is to be dated both from the 1710 and the 1712.

But the observation upon which the petitioners seem chiefly to rely, is the sum of arrears mentioned in the account made up by the son of Mr Campbell, being ninety-nine bolls, and L. 75, exactly tallying with the sum of rents or bygonies, mentioned in the different memorandums: and it is said, that as the charge in that account respects only the years 1712, 1713, 1714, and 1715; so the rents, for which he takes credit, cannot possibly apply to any other years than the years contained in the charge.

The respondent does not deny, that the article of rents by the tenants, as stated in the random account made up by young Campbell, exactly tallies with the sum-total of the rents contained in the father's memorandums. But the petitioner is wonderfully inaccurate, when he contends, that those rents or bygonies must relate only to the particular years mentioned in the charge of the random account made up by young Campbell; because the charge and discharge ought to respect the same years: for if the petitioners will give themselves the trouble to revise their calculation with a little more attention, they will find, that there is no such correspondence betwixt the charge and discharge, as that upon which their argument is founded; for, confessedly, the charge comprehends only the years 1712, 1713, 1714, and 1715: whereas the sum of ninety-nine bolls, L. 75, comprehends the rents mentioned in the father's memorandum, as due for the after years 1716 and 1717: so that this exact tally, held forth by the petitioner as so conclusive amounts to neither more nor less than this, that the son James, in making a state from his father's memorandums, had thrown into a slump article the whole bygonies appearing to be due

due by the tenants upon the face of his father's memorandums; without the least regard whether these answered to the years of the charge or not.

The petitioner supposes it is very unnatural, that these old rests should be kept up separate from the more recent arrears, or that the rents of later years should be paid up, at the time that the arrears of the preceding years are still outstanding. But there is nothing in this observation. From the long time the rents were in the tenants hands, the sum of arrears would be large, and the trustees would of necessity be obliged to be somewhat indulgent as to the time of levying them; so that they would be gradually levied. But this was no reason why, in levying the current rents, they should depart from the right of hypothec, and other legal compulsators, for operating payment of the current rents as they fell due.

Having said so much in refutation of the petitioner's observations, the respondent must beg leave, before leaving this point, to bring under the view of your Lordships, an observation upon one of these memorandums, which will enable you to determine which of the parties are best founded in the construction which they put upon *old rests* or *bygones*.

The particular memorandum to which the respondent desires the attention of your Lordships, is that respecting Donald Williamson, who is represented as being only resting the victual-rent 1715 and 1716, and the Martinmas debt 1715: but besides this, he is represented as likewise owing *thirteen bolls old rest*. This, with submission, is demonstration, that this must mean some old arrears, not of the 1712, 1713, or 1714; for it will be observed, that thirteen bolls is four bolls more than a whole year's victual-rent; and therefore, if it had related to the years mentioned in this memorandum, it would have run, that he was due the victual-rent 1714, 1715, and 1716, and four bolls of arrears; but the manner in which it is stated does, with submission, clearly prove the respondents construction put upon the expression *old rests*.

And your Lordships will be further pleased to observe, how wonderfully this observation is corroborated by Clark's letter of the 7th of May 1711, which has been already more than once mentioned. The words are, "I agree, that Patrick Swanie's son shall get what Thomas Groat possessed, and endeavour, if possible, to cause him take Williamson's possession: for I'll not continue him any longer in it. I'll send you instructions by the first of June

" for

" for prosecuting the bygone rests." — Here your Lordships will observe the resolution mentioned, of not continuing Donald Williamson. You likewise see mention made of instructions to prosecute for bygone rests; and, corresponding to this, you see from the memorandum, that Donald Williamson, who, by some indulgence had been continued, is much deeper with regard to these bygone rests than any of the others, which contains a very good explanation why Clark was resolved to continue him no longer; and Peter Swanie being due none of these old rests, affords likewise a very good reason why Clark should be desirous that his son should succeed to Williamson's possession.

As the memorandum, holograph of Plaids, has been so fully brought under the view of your Lordships in former papers, and is again mentioned in the reclaiming petition for the respondent, it is unnecessary here again to enlarge upon it. That it is holograph, your Lordships can judge for yourselves, upon inspection; and when it so directly charges upon Clark and Innes the intromissions with the rents from the 1694 to the 1710, it is impossible but that your Lordships must pay regard to a document of such antiquity. The fact must have been notorious, either the one way or the other, at that time; and it is impossible to say, that there could be any intention to mislead or impose upon the Earl of Cromarty, so far back as the 1714, when, from every circumstance, it is apparent, that the Earl must have been in the full knowledge how the fact stood: for surely he could not be ignorant, if either he himself, or Mackenzie of Prestonhall, had levied these rents, as the petitioners one while supposes; and far less would Plaids have had the assurance to charge those intromissions upon Innes and Clark, if he himself had so intromitted, as the petitioners another time would suppose. In short, in the 1714, the fact must have been well known; the Earl of Cromarty must have had particular knowledge of it; and therefore, when, in a writing to him, Plaids does so pointedly charge the intromission of those rents, from the 1694 down to the 1709, upon Innes and Clark, the evidence is irresistible; and it is hoped it will occur in that light to your Lordships.

The petition misrepresents the respondent's argument, when it talks of endeavouring in this manner to create a debt by his own assertion: for it is not barely the assertion, but the time when, the

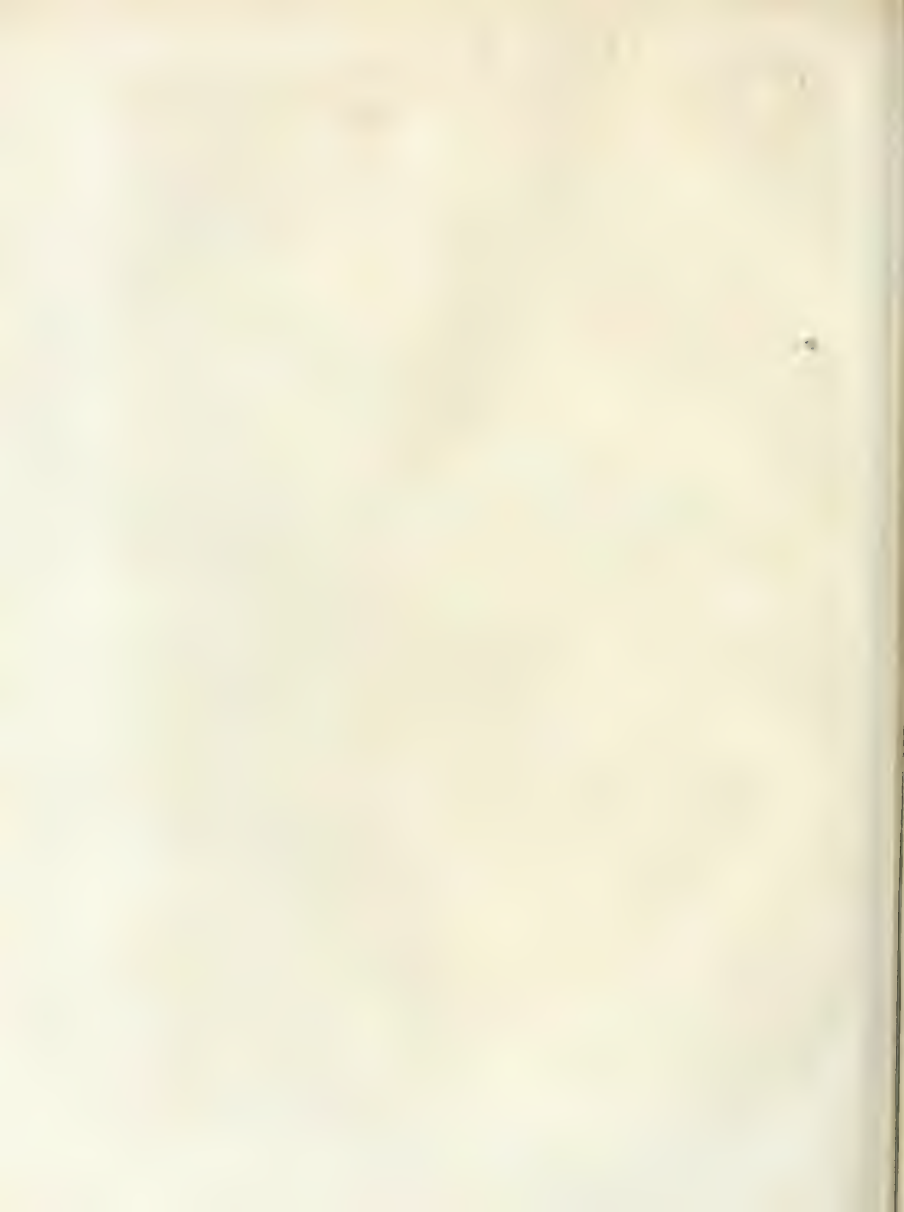
the person who, and the person to whom, the allegation is made, which all concur together to render these writings lately discovered so material an evidence for determining whose these rents were from the 1694 to the 1709.

Although, in several particulars of less importance, misrepresented both in point of fact and argument, the respondent does not propose to trouble your Lordships with a minute discussion, he cannot conclude without taking notice of the unjust clamour which is thrown out, of an improper delay and procrastination on his part. In common modesty, the petitioners might have refrained from this charge, when the circumstances of the case are considered. No wonder that the conduct of the cause, on the part of the respondent, should be involved in darkness and difficulty : for on account of the total neglect of the trustees, not to call it worse, either to preserve, or to exhibit accounts, as expressly bound by the tenor of their backbonds, the pursuers leave the respondent to grope in the dark in those very particulars in which it was the duty of the trustees, or those in their right, to have given them light. At the same time the respondent has the satisfaction to reflect, that every additional research and discovery of evidence has been attended with additional success. Thus the petitioner obstinately denied, that her authors had received payment of the large debt due by William Innes ; and had not a voucher in writing been luckily and unexpectedly found, the respondent would have been cut out of it. In the same way, she denied, that her authors had had possession of the lands of Cannisby prior to the 1719, when Alexander Clark disposed to Sir Patrick Dunbar ; and upon this false averment, she obtained several interlocutors against the respondent upon this point, both before the Lord Ordinary and your Lordships. But at last complete evidence was providentially found of the possession of her authors long before ; and upon it your Lordships have found her accountable from the 1709, which is for ten years more than she admitted.

And, upon the whole, when the case is again reconsidered, the respondent flatters himself, you will not only adhere to this interlocutor in so far as it goes favourable for him, but will likewise grant the prayer of the reclaiming petition which is offered on his part.

In respect whereof, &c.

HENRY DUNDAS.



JUNE 11th, 1771.

A N S W E R S

F O R

Mrs. ELIZABETH DUNBAR, and JAMES SIN-
CLAIR of Duran, Esq; her husband,

T O T H E

P E T I T I O N of ALEXANDER CUTHBERT, Esq;

THE said petition of Alexander Cuthbert, Esq; prays your Lordships " to find the respondents fall to be charged, " in the accounting, with the whole rents of West " Cannisby, from the year 1694."

Every argument, by which that demand is endeavoured to be supported, has already received a full answer in the counter-petition, presented the 9th of March last, on behalf of the respondents, in which also every fact material to the cause is stated at length; a few words therefore shall suffice in the present answers.

The question is not, as the petitioner all along supposes, whether Innes and Clerk, or the respondents, who stand in their right, shall account or be liable for their intromissions, but whether, in point of fact, Innes and Clerk did intromit with the rents of West Cannisby from 1694 to 1710?

To which another question is prejudicial, viz. " Whether were those rents actually resting owing in 1710, and did they remain unpaid during that long period of 16 years?" For, if they were not resting at the commencement of Innes and Clerk's right, Innes and Clerk could not possibly uplift or intromit with them.

On this point, a number of irresistible circumstances are already stated in the respondents petition; the following only shall be noticed here:

1mo, That John Cuthbert of Castlehill, the petitioner's father, who received his right in 1713, only two or three years after the commencement of that of Innes and Clerk, and who therefore must have been fully informed of the fact, did not pretend, in the action then brought against them, to alledge or charge, that they had uplifted those rents, or had any intromissions prior to 1710.

2do, In the action brought in 1732, at the instance of the said John Cuthbert of Castlehill, against the representatives of Innes and Clerk, and Sir Patrick Dunbar, Castlehill concluded against them for crop and year 1711, and subsequent crops only.

3tio, In the proceedings on the submission, into which the parties entered in 1733, it was not pretended by Castlehill, that Innes and Clerk had any intromissions prior to the year 1711.

4to, In the other action, raised in 1734, at the instance of his son, George Cuthbert of Castlehill, the summons concludes against them in like manner for crop and year 1711, and succeeding years only. And it is a mistake, that, in any one of these processes, or in any part of the proceedings, Sir Patrick Dunbar is or was ever supposed, (as is alledged in the petition,) to have intromitted with those rents, or to have possessed the lands prior to the 1719. This was impossible, because his right commenced in 1719, and he was made a party to these processes only, because he stood in the right of the subjects at the time, and being the assignee of Innes and Clerk, was liable to give credit for all the intromissions which they appeared to have had. In that sense the respondents are *eadem persona* with Innes and Clerk, but in no other, for they are assignees merely: and it is not true, that any papers belonging to Plaid, other than those necessary for establishing his right to the particular subjects made over, were delivered to Sir Patrick Dunbar, as appears from the oaths of all those examined on the diligences granted at the petitioner's instance, as well as from the exhibits themselves, which prove, that the accompts of Campbell's intromissions had never been delivered to Sir Patrick, but remained all along in Campbell's own keepings.

These circumstances amount almost to demonstration, that Innes and Clerk had no intromission previous to the year 1710, and show the knowledge and conviction, which the petitioner's father,

as

as well as brother, and all others who had best access to be informed, had of the fact.

The respondents, therefore, shall only add, 5to, That, among all the jottings, papers, and accounts, which have been produced out of the repositories of clerk Campbell, not a scrap has been recovered, which gives the least hint or suspicion of any prior intromission; a circumstance which agrees exactly with the conclusions and terms of the foresaid summonses and proceedings.

But if the rents could not be resting during the long period, from 1694 to 1710, little need be added upon the matter of the defender's petition, which does not contain any *argument* discoverable by the respondents, and admits, that the petitioner cannot prove or bring the least evidence, that Innes and Clerk intromitted with any of those rents, but makes an *assertion* merely, that seems in substance to be reduceable to one proposition, viz. " That the *onus probandi* lies on the respondents, and that they are chargeable " with all the rents with which they do not prove, that Innes and " Clerk did not intromit."

But the nature of the present action and claim, which is greatly mistaken by the petitioner, will clearly show, that the *onus probandi* neither does nor can lie on the respondents. Innes and Clerk had advanced large sums to and for Plaids, in which they became *creditors* to him, and which therefore he was bound to *re-pay* them. Accordingly, for their security and payment, he made over to them in 1710 the three funds recited in the petition, viz. the lands of West Cannisby, the debt due by William Innes, and that on Cromarty. By the terms of the rights then granted in their favour, they were expressly declared liable, not for omissions, but for intromissions only; and the present action is not instituted for affecting or recovering other funds, as the petitioner says, page 8th, but for making effectual one of those very funds which was made over to them for their security and payment. In these circumstances, it matters not at whose instance the present action is brought, whether of the petitioner or of the respondent, and the utmost, which can be incumbent on the respondent, is, to show, that she, or Innes and Clerk, were creditors to Plaids. Thus far, perhaps, the *onus probandi* might be said to lie on the respondent, and thus far she has gone;

gone; for it is a gross mistake, what is averred in the petition, page 7th, " That many of the articles of charge sustained by the " accountant in their favour, are rested entirely upon the *trust-right*, which, *inter alia*, provides, that an account, signed by " them, shall be a sufficient charge; for, upon this clause of the " trust-right alone, many articles have been sustained to them, " *merely upon accounts signed by them.*" The reverse is the fact; not a single article has been sustained to them, either by the Lord ordinary or by the accountant, which is not proved by clear vouchers, produced under the hands of Plaids himself; and the evidence must be strong indeed, since the petitioner, well disposed as he is, has not disputed a single article of that charge. This evidence the respondent has brought; and the debt due to her is clearly established by it. But farther the *onus probandi* cannot lie upon her; not on account of the express terms of the back-bond only, which ought surely, like express articles in other covenants, to be the *regula regulans* of the rights and interests of parties, but also by the very nature of the thing.

A creditor is not bound to prove that his debt is *not paid*; 'tis the debtor on whom it is incumbent to prove payment, if he alleges it; and it makes no difference, whether the satisfaction he alleges is averred to have been made in the way of actual payment, in that of compensation, or in any other: still the *onus probandi*, that satisfaction has been made, must and can only lie on the debtor.

In this light the matter has all along appeared to the petitioner himself: the purpose of every step of the procedure, on his part, has been, to *bring evidence* of intromissions had by Innes and Clerk, in order to *prove* extinction and payment of the debt confessed to be due to them. In this view, diligences and proofs have been demanded by, and allowed to him, almost without number. It is therefore running counter to the principles implied and fixed by every interlocutor pronounced, and paper given in in the cause, as well as to every rule of law, to insist, that the *onus probandi* lies on the respondent, and that she is bound to prove Innes and Clerk neither did or could intromit: that would be demanding of her a thing never heard or demanded of any creditor: negatives prove themselves; and if satisfaction, payment, compensation, or intromission is alleged, undoubtedly evidence must be brought of
the

the allegation by the debtor, who makes, and is bound to prove it.

Had Sir Patrick Dunbar entered a claim for the debt on the forfeited estate of Cromarty, in terms of the vesting-act, his claim, being preferable to that of Lady Castlehill, would undoubtedly, have been preferred; and he would not, in that case, have been obliged even to prove, that Innes and Clark were *creditors* to Plaids; but Lady Castlehill, if she had thereafter brought an action against him to denude, in whole or in part, would, before she could have obtained decret, decerning him so to do, have been obliged to *prove*, that the debt due to Sir Patrick had been satisfied and paid: which being the case, the respondent's right and condition cannot be rendered worse, by the accident of Sir Patrick's having forgot to enter a claim.

And it is equally groundless, as it is irrelevant, what is said, That Innes and Clark ought to have kept an account, which they did not do; and that the respondents are insisting the petitioner shall denude of the claim sustained to his predecessor, Lady Castlehill, without exhibiting any account of their intromissions, or giving credit for them.

In the first place, the keeping of an account is not, as the petitioner says, an obligation imposed on Innes and Clerk, by the rights granted in their favour. They were indeed bound to render an account, on being desired or sued; and this they were always willing and ready to do, as appears from the proceedings, both in the fore-said processes, and in the submission between the parties. But Castlehill, instead of demanding judgment in the submission, or pushing the processes to an issue, took no step for bringing them to a conclusion; which, as Sir Patrick Dunbar not only asserted his claim, by intimating his right directly, i. e. in the 1720, to the Earl of Cromarty, but entered his claim before the arbiters, and produced vouchers of it, is strong real evidence that Castlehill himself was satisfied, both of the extent and of the justice of the debt, which Sir Patrick asserted and proved to be due to him.

It is a mistake, what is said in the petition, page 5th, That Sir Patrick, in order to avoid a count and reckoning, raised a process of reduction and improbation against Castlehill, to cut down his title. This process the respondents never heard of, and it is not produced; but if it had actually been raised, it makes

B

directly

directly against the petitioner, as it is strong evidence of the notorious injustice of the foundation of his right.

In the second place, were it true that Innes and Clark had neglected to keep an account, the consequence thence drawn in the petition is a length and severity which law and justice will not go; that they must therefore be charged with the whole rents of West-Cannishby, from 1694 to 1710, without any evidence that they intromitted with them, as this would amount to a forfeiture of so much of their property; and the same argument would make them also liable for the debt on Cromarty, notwithstanding that it is confessedly outstanding.

But, in the third place, in point of fact, it cannot be presumed, that they did not both keep and render an account: the presumption is, that they did both; which appears indeed to have been the case. They had confessedly no intromission with the debt on Cromarty, so could keep no account of it: William Innes's debt was only one single article, so did not admit or require any particular account: Clerk Campbell was the person by whom they had any intromission or possession of the lands of Cannishby, the only other subject disposed to them, or with which they could intromit; and accounts actually kept by him, of his and their intromissions with those rents, have been recovered, and produced in process.

In the fourth place, the respondents have rendered and exhibited an account of all the intromissions they ever heard of; and they do not pretend, as the petitioner says, that they shall not be charged for every penny with which Innes and Clark intromitted; but they do with some confidence insist, that they neither can nor ought to be charged with more; and that they are not liable for any intromissions which Innes and Clerk are not proved to have had.

The circumstances which appear in evidence, repudiate the making of any presumption against the trustees. Instead of acting an indifferent part to Plais, as is pretended by the petitioner, it is proved, by the acknowledgment of Plais himself, made in the deed recited in the respondent's counter-petition, p. 4, as well as by undoubted vouchers produced, that they made large advances for him, even before they touched a penny of his funds, as well as with a distant prospect of making them effectual. They acted therefore a most friendly part to him, and are most onerous creditors,

creditors, entitled in justice to payment; but the same cannot be said of Castlehill: his claim is most suspicious and unfavourable, being founded on a bond of corroboration, which he had the address to take from Plaids, *remotis arbitris*, in 1712, of even date with the notable discharge mentioned in the respondent's petition, in security and payment of certain pretended debts, of which not a single voucher is, or has been offered to be produced. Indeed, Castlehill himself appears to have been conscious of the advantage which had been taken of Plaids, for he kept the assignation that was granted in his favour to Innes and Clark's back-bonds, *latent* for twenty years, and did not intimate or take a single step for making it effectual, till 1732, when Plaids was dead.

In these circumstances, it cannot be supposed, that if Innes and Clark had intromitted with any part of the rents prior to the 1709, some evidence would not have appeared of the fact.

Your Lordships have found the respondents not liable for any rents other than those payable by tenants, who appear to have been in possession at 1709. The petitioner (pet. p. 7.) alledges, that three of the tenants, who had possessed in 1694, were in possession in 1711; but even this is asserted without the least evidence; and he is afterwards obliged to admit, (p. 12.) "That it does not appear who were the tenants in the lands of Cannisby when Innes and Clerk got the right from Plaids; so that it cannot be known whether the tenants that possessed at the time of their entry, were the same who possessed them in 1694." The matter, therefore, according to his own showing, is inextricable; and no regard will be had to the *conjecture* which he is pleased to make, that the tenants, who were in possession in 1710, were either the relicts, the heirs, or disponees, of those who possessed the lands in 1694. The conjecture is not only unsupported by evidence, but is shown in the respondent's counter petition to be contrary to it; for that those who possessed in 1710, appear to have been new tenants, recently admitted into possession for the years particularized in clerk Campbell's accounts; but if they had been connected either by blood or otherways with the former possessors, still that would have no tendency to shew they continued to possess in their right, and that any arrears were either due at 1710, or uplifted thereafter by Innes and Clerk.

It

It is of no earthly consequence, what is said by the petitioner, that no mortal had a title to remove the tenants till 1710, when Innes and Clerk, are alledged to have taken the extract of the decret in process, for enabling them to assume the possession of the lands. It has been shown, in the respondent's petition, that that could not be the first extract which was taken out; but, if it had, it was no legal title of removing; and as Innes and Clerk were never infeft, their right was no better than that of Plaids himself, who, as he was *in titulo* to receive the rents, and no doubt did it, so he could remove tenants, at least as much as Innes and Clerk, his assignees. In those days, and in that part of the country, tenants could more easily be compelled, both to remove and to pay their rents, without the aid of titles, or processes strictly legal, than they can now, that law and justice have gradually forced their way, even into these distant parts of the island. The want, therefore, of a title strictly formal, can afford no ground for believing that Plaids did not both uplift the rents, and remove the tenants: in Caithness, they would both pay and remove at the nod of the proprietor; and it cannot be believed that any rents remained unuplifted prior to the 1710, or that Innes and Clerk had any intromission with them.

In respect whereof, &c.

G E O. W A L L A C E.

July 31. 1771.

UNTO THE RIGHT HONOURABLE,

The Lords of Council and Session,

T H E

P E T I T I O N

O F

ALEXANDER CUTHBERT, Esq;

HUMBLY SHEWETH,

THAT Sir James Sinclair of Mey being incumbered with debts, his estate was brought to a judicial sale in the 1694, when the greatest part of it was purchased by the Earl of Cromarty, for behoof of the heir of the family. But as the residue of the estate did not find a purchaser, what remained unfold was parcelled out and divided among the creditors in proportion to their debts.

Alexander Cuthbert, Provost of Inverness, being of the number of these creditors, his interest was produced in the ranking: but he happened to die *pendente processu*. His nephew and heir John Cuthbert of Plaids, was an infant at the time, and Provost Cuthbert's interest was ranked for its proportion of the price of the lands purchased by Lord Cromarty, and the lands of Wester Cannisby allotted to that interest in the division of the unfold lands, not in name of any particular person, but of Provost Cuthbert's representatives in general.

That the tutors or curators of John Cuthbert did not intromit with the rents of these lands is certain, as will appear from the

A

sequel;

sequel; and it is admitted, that they did not receive from Lord Cromarty the proportion of the price of the lands purchased by him, for which Provost Cuthbert's representatives were ranked, as that debt was claimed by Mrs Jean Hay, the widow of Cuthbert of Castlehill, upon the late Earl of Cromarty's forfeiture, as a debt affecting that estate; and the claim was sustained by judgment of this court.

From the titual accounts it appears, that the tutor had never attained possession of the lands of Cannithy, nor had any intromission with the rents of these lands. Lord Cromarty retained that part of the price for which the debt due to Provost Cuthbert's representatives had been ranked on his purchase; and as Provost Cuthbert's infant heir was the only person who could have a title to intromit with or discharge the rents of Cannithy, these were allowed to remain in the tenant's hands from the 1694 to the 1709; and several of the tenants, possessors of these lands in the 1694, continued in possession of their respective farms down to the 1709, and for several years thereafter, in good credit, and made punctual payment, both of the current rents, and any arrears they were owing.

John Cuthbert of Fluids, the heir and representative of Provost Cuthbert, his granduncle, being naturally feeble, weak, and indolent, and in that respect improper to be intrusted with the management of his own affairs; and being at the same time incumbered with some debts, for the payment of which, provision be-
 Aug. 15. 1709 haved to be made, was prevailed upon, by a deed of this date, to grant "a faculty to Robert Innes of Mondole, and Alexander Clark, one of the bailies of Inverness; whereby he constitute
 " them his very lawful factors, actors, and special errand-bearers,
 " for meddling, intromitting with, and receiving all debts and
 " sums of money whatsoever, and others any manner of way
 " due and adheved to him, whether heritable, real, or moveable;
 " particularly, and but preiudice of the foresaid generality, the
 " following articles." 1st, What sums were due to him by the
 Earl of Cromarty, and Sir James Sinclair of Mey, alluding to the
 debt affecting the estate of Mey, and ranked upon the price of
 that part of the estate which had been purchased by Lord Cro-
 marty. 2nd, What was due by the tenants and possessors of Can-
 nithy, who in four Lordships will disterve, could only mean and
 demand the hyponic rents for crop 1708, and proceedings, as it had

no relation to the rents of any after years, but allenarly those that were then resting owing by the tenants of Cannisby; and, as again expressed in an after clause of the same deed, all sums of money, and others whatsoever, any manner of way due, resting, and indebted to the said John Cuthbert, by all and every one of the above-designed debtors and tenants.

Of the same date, Innes and Clark granted backbond, obliging them, their heirs, executors, and successors, to make just count, reckoning, and payment, of what sums of money they should happen to recover " from all or any of the above-designed debtors and tenants, by virtue of, and upon the aforesaid right, deducing always, and allowing, in the first place, all and whatsoever debts they should happen, to procure right and title to, due by the said John Cuthbert, to whatsoever person or persons, with all necessary and contingent charges and expences that they should happen to deburse and give out in the said affair, with a competent salary for their own pains and travel in negotiating and managing his said affairs; thereby declaring, that what debts should be acquired from any of the creditors of the said John Cuthbert, which they should pay and purge by his own effects, any composition which they might happen to procure upon such payment, the same should truly and effectually redound and be communicate by them to the said John Cuthbert himself, and his forefairs." Aug. 15. 1709.

Innes and Clark do not however appear to have ever seriously intended the fair execution of the trust they had thus undertaken. Their private affairs were then *derangé*, and a sum of money was what they had immediate occasion for. In this view, as the subjects particularly above mentioned were most likely to answer that end, or to be a fund of credit, they easily persuaded the poor weak man to execute an assignment of the premises in their favour.

Accordingly, by deed of this date, proceeding upon a false and affected narrative of its being granted for onerous causes, Plaidis sold, disposed, and assigned to them, their heirs, &c. the apprisings which he had against the estate of Mey, with all right, title, or interest, he or his predecessors had thereto; and particularly, but prejudice of the foresaid generality, any share, part, or portion of the said estate of Mey, allocate and set apart for the said John Cuthbert, by the Lords of Council and Session, in the
decret. Oct. 21 1709.

decreet of sale of the same, passed in the year 1694, and the security given therefor by George Earl of Cromarty, or whoever else was the purchaser, principal, annualrents, and penalties therein contained, with the lands of Easter (by mistake for Wester) Cannilby, in the shire of Caithness, also destinate by the said Lords for a part of the payment of the sums contained in the foresaid appraisings, with the mails and duties thereof, bygone and to come.

Oct 21. 1709. This was also qualified by another backbond of the same date ; whereby, upon a recital that the same was only a trust put upon them by the said John Cuthbert, in order to satisfy and pay his debts, and manage his affairs upon the terms and conditions under written, they bound and obliged them, their heirs, &c. to make just count, reckoning, and payment, to the said John Cuthbert, his heirs, &c. of any sum or sums of money, which they, or any of them, should receive from any person, by virtue of the disposition and right before mentioned ; provided, that out of the first and readiest of any sums of money arising or to be received, they are allowed to retain in their own hands, as much thereof as will completely satisfy and pay them all, and every debt and sums of money due by the said John Cuthbert already satisfied and cleared by them, or which they should have satisfied and cleared thereafter, conform to the rights of the said debts to be granted by his creditors to them ; and likewise for all sums advanced, or to be advanced, to John Cuthbert himself, or to be expended in recovering and making effectual the subjects disposed, and for their personal charges, and a competent salary for their own pains : And by this backbond the trustees become further bound, to bring the subject of the foresaid appraisings against the said estate of Mey, with what ensued thereupon, to a period and conclusion, by a friendly agreement with the Earl of Cromarty, betwixt the date thereof, and the day of 1710 ; or else if the said Robert Innes and Alexander Clark could not agree therein, to intent a legal process against all parties concerned, and prosecute and follow forth the same until the final end thereof.

From which your Lordships will perceive, that as the bygone mails and duties of the lands of Cannilby, as well as those to come, was one of the special subjects thereby assigned in trust to Innes and Clark, to be applied for compounding the debts due by
Plaidis,

Plaids, they not only undertook to do the proper diligence for making those, and the other subjects of the apprisings against the estate of Mey, effectual within a limited time, but stipulated payment of a competent salary for their pains and trouble, and payment of their personal charges.

But as this deed was deemed so far defective, as it contained no procuratory of resignation, nor decret of seisin, they took from him a third deed; whereby, after reciting the two former deeds, Jan. 30. 1710. and that Innes and Clark were desirous to have the aforesaid subjects more specially transmitted to them, he conveyed to them particularly the foresaid apprisings, decret of ranking and sale, sums and lands adjudged to him by that decret, with procuratory of resignation, and precept of seisin, and containing an assignation to the mails and duties for bygones, and in time coming; and as Plaids had not been infest in any of these subjects, they, of the same date, took from him a bond for 50,000 merks, and having thereupon charged him to enter heir to his granduncle the Provost, they obtained adjudication of the whole subjects and June 29. 1710. lands conveyed.

And, of even date with this last mentioned deed and bond, they Jan. 30. 1710. granted a third backbond, much of the same tenor with the former; whereby they acknowledged, "that albeit the said disposition, assignation, and bond, do contain and bear the same" "to be granted for an onerous cause, on receipt of money by the" "said John Cuthbert, from the said Robert Innes and Alexander" "Clark; yet the truth was, the same were granted to them, partly as" "a security to themselves, and partly in trust, in order to manage" "the said John Cuthbert's affairs; therefore they bind and oblige" "them, their heirs, &c. to make just count, reckoning, and payment, to the said John Cuthbert, his heirs, &c. of any sums of" "money they, or any of them, should receive from any person," "by virtue of the dispositions and bond before mentioned:" but qualified as in the former back-bond, that they should be allowed to retain out of the first and readiest of any sums of money, or mails and duties that they shall recover, as much as will completely satisfy and pay them all debts and sums of money due by the said John Cuthbert, already satisfied and cleared by them, and which they shall satisfy and clear thereafter; and likewise for all sums advanced, or to be advanced, to the said John Cuthbert himself, expences in recovering the subjects disposed, and for a competent

petent salary for their own pains. And this, as well as the former backbond, contained a *proviso*, that they shall only be accountable according to their intromissions, and what they shall accept, receive, or take, by virtue of the said rights, but that they shall not be liable for omissions.

Innes and Clark having thus accomplished their views, in obtaining conveyances of the premises, and the rights vested in their persons, they counteracted their trust in the grossest manner, as most of the funds recovered they applied to their own uses, neglected compounding the debts, and suffered the poor man to be thrown into jail.

Cuthbert of Castlehill, a near relation of Plaids, and at the same time a considerable creditor, moved with these considerations, was prevailed with to interpose his good offices, partly for securing the debts due to himself, and to rescue the affairs of his friend from out of the hands of these trustees. They had entered into immediate possession of levying the rents of the lands of Cannisby for the crop and year 1709, and bygone arrears from the 1694 downwards; and in 1710, they had received payment of a debt due by Sinclair of Ulbster, to the amount of about L. 2000 Scots, and were not, at the date of the first factory, creditors to Plaids in any sum whatever: so that any sum which they advanced to Plaids, or to such of the creditors as they compounded with, were out of their intromissions with his proper funds.

Upon Castlehill's interposing for the above-mentioned purposes, Innes 1717: he obtained from Plaids a conveyance to the same subjects which had been before conveyed to Innes and Clark, and to the several backbonds granted by them, qualified by a backbond of even date, declaring the conveyance to be in security of the debts due to him therein particularly mentioned, and obliging him to account for his intromissions, after payment of these.

In the same year 1713, Castlehill, upon the title of the aforesaid disposition in his favour, brought a process against Innes and Clark, to account for their intromissions, and to denude in terms of their backbond; and upon the dependence he used both inhibition and arrestment. It was frequently renewed, and insisted in; particularly in 1732, when it appears to have been revived both against the trustees themselves, and against Sir Patrick Dunbar and the Earl of Cromarty: and though the same was never brought to a conclusion, full warranting was thereby given, both to the trustees

stees themselves, and to Sir Patrick Dunbar; who had come in their place, that they would be obliged to account for their intromissions and management; which therefore was a double tie upon them, not only to have prepared, but also to preserve, a regular account of charge and discharge of their intromissions with the proceeds of the trust subjects, and vouchers thereof.

In 1719, Clark, one of the trustees, became bankrupt, as did Innes, the other trustee, soon thereafter; and as Sir Patrick Dunbar of Northfield was creditor to Clark in relief of certain engagements for him, he obtained from Clark, in manifest breach of the trust he had undertaken for Plaids, a conveyance to his share of the several subjects which Plaids had disposed, by the several deeds above mentioned, in favour of Clark and Innes.

This deed proceeds upon a recital of Sir Patrick Dunbar's engagements for Clark; that John Cuthbert had right to several apprisings and adjudications upon the estate of Mey; that he had also a particular decret of sale, and preference upon the lands of Cannisby, and was also preferred to the sum of L. 5154:14:10 of the price of the lands of Cadboll, and others, at the time of the sale of said lands before the Lords of Session, for which the Earl of Cromarty had granted bond to the said John Cuthbert: to all which he the said Alexander Clark had particular rights from the said John Cuthbert; therefore, and for implement of his obligation to Sir Patrick Dunbar, and for his security and relief, he thereby assigned and disposed to Sir Patrick, the foresaid apprisings and adjudications, and sums therein contained, to which the said John Cuthbert had right, together with the foresaid decret of sale and preference; and particularly the said lands of Cannisby, and the sums of L. 5154:14:10, whereto he the said John Cuthbert was preferred out of the price of said lands, with the bond granted therefor by the Earl of Cromarty. It contains a special assignation to the whole writs and evidents; and more particularly to the mails, farms, and duties of the said lands of Cannisby, from and after the term of Whitsunday last past, 1719.

Innes, the other trustee, dying soon thereafter bankrupt and insolvent, Sir Patrick Dunbar, as in the right of Clark, was decerned executor-creditor to him, and took decret *cognitionis causa* against Innes's son and apparent heir; and upon Sir Patrick's death, his daughter, Mrs Elisabeth Dunbar, in virtue of a general

ral disposition from him, confirmed the sums in the foresaid decret *cognitionis causæ*; and thereupon took decret of adjudication of Innes's half of the whole subjects that Plaids had disposed to him and Clark.

Castlehill granted a general disposition to his wife Mrs Jean Hay, for behoof of herself and children; whereupon she obtained an adjudication in implement, against Castlehill's heir, of all the subjects to which he had right; particularly the lands of West Cannisby, and sums to which Plaids was preferred in the ranking of the creditors of Mey by the decret 1694; and she thereafter acquired from the daughter and heir of Cuthbert, Plaids, a disposition of all lands, heritages, and other rights, which had belonged to her father, and a ratification of all rights and deeds granted by Plaids to Castlehill.

And as by means thereof she came in Plaids's place, both as to the lands of Cannisby, which had been decreed to Provost Cuthbert's representatives by the decret of division 1694, and to the debt due by the Earl of Cromarty to Provost Cuthbert's heirs, as his proportion of the price of the lands purchased by the Earl; so she had right to the several backbonds granted by Innes and Clark; and as Sir Patrick Dunbar, as in right of Innes and Clark, for security and relief of the debts due by them to him, could be in no better case than his authors, she was intitled to call upon them to render an account of charge and discharge of their own and author's intromissions with the trust-subjects, in extinction of the debts due by Plaids, to which they had acquired right, and to the benefit of any compositions got in transacting the debts, that being the special purpose for which the subjects had been conveyed to them.

Matters thus standing, Mrs Jean Hay, the petitioner's mother, in whose place he now stands, entered her claim upon the forfeited estate of Cromarty, for the debt due to Plaids, as ascertained by the decret of ranking and sale in the 1694; in which, however strenuously contested on the part of his Majesty's Advocate, she met with no opposition from Sir Patrick Dunbar: but after she had prevailed in having the claim affirmed, after a troublesome and expensive litigation, Mrs Elisabeth Dunbar, and Sinclair of Duren, her husband, for his interest, as in right of Sir Patrick her father, brought the present process, concluding to have it found and declared, that she had the preferable right to the afore-
said

said debt upon the estate of Cromarty, in payment and satisfaction of the debt said to be still due by Plaids to Innes and Clark.

It is unnecessary, upon this occasion, to trouble your Lordships with a minute recital of the various points that came to be disputed in the litigation which thereupon ensued; let it suffice to observe, that it was at length finally ascertained, by repeated judgements of this court, that the pursuer was not obliged to denude of the debt upon the estate of Cromarty, further than as the pursuer should instruct Innes and Clark to be still creditors of Plaids.

This point being fixed, and the process thereby resolving in a count and reckoning; as it was incumbent on the pursuers, by the regulations of court, and from the nature of their own and their authors rights, to exhibit an account of charge and discharge of their own and their author's intromissions, the Lord Ordinary made repeated orders for that purpose; which, after long evasion, at length produced a sham account and condescendence of the debts said to be due by Plaids to Innes and Clark, but without giving any credit for their intromissions with any of the proceeds of the trust subjects; of which, being singular successors, they pretended to be totally ignorant, and to have no knowledge of their authors intromissions, particularly of the rents of the lands of Cannisby prior to the 1719, when Sir Patrick Dunbar entered into the possession of these lands upon the right acquired from Clark. This, however, produced a remit to an accountant, who made his report, stating sundry points for the Lord Ordinary's opinion, particularly with respect to the period from which the pursuer should be accountable for the rents of the lands of Cannisby, viz. whether from the 1694, when, by the decret of division, Plaids's right to the mails and duties of these lands took place; or 2dly, from the 1709, the date of the trust-assignment to Innes and Clark; or, 3dly, from 1719, when Sir Patrick Dunbar confessedly gained the possession upon the right attained from Clark.

The pursuer repeatedly denied, that either her father Sir Patrick Dunbar, or any of the original trustees on whose right she stands, had had any intromission with the rents of Cannisby sooner than the year 1719; and therefore contended, that she could not be accountable for the rents from an earlier period.

It was, on the other hand, contended for the petitioner, That as the original trustees, the pursuer's authors, were assigned to the decret of ranking and division 1694, with all that had followed

thereon, particularly to the bygone rents of the lands of Cannisby from the 1694, they must be presumed to have intromitted with the rents of these lands, and with all the subsequent rents, from the 1709 to the 1719, unless they could alledge and show, that they had been debarred therefrom, or that other persons had intromitted therewith, or that the same could not be recovered or made effectual.

July 14 1748. But the Lord Ordinary, by interlocutor, was pleased to find,
 " That the pursuers are only obliged to account for the rents of
 " the lands of Cannisby from Whitsunday 1719; in respect the
 " defender offers no proof of an earlier possession by Innes and
 " Clark, the original trustees, and shows no sufficient cause for
 " resting upon bare presumptions of an earlier possession." And
 Jan. 25. 1769. to which your Lordships adhered

But as these interlocutors were founded singly upon this ground, That the presumptions of an earlier possession, unsupported by any proof, were not *per se* sufficient to make the pursuer accountable for the rent of these lands prior to Whitsunday 1719, the petitioner, in the after proceedings before the Lord Ordinary, demanded, and was allowed, a proof of Innes and Clark's intromissions with the rents of these lands prior to Whitsunday 1709; and such proof as could then be had being accordingly taken, and
 July 7. 1769. reported to the Lord Ordinary, his Lordship found, that the defenders had not brought any sufficient evidence to prove or instruct, that Innes and Clark had possession of the lands of Wester Cannisby, prior to their disposition in favour of Sir Patrick Dunbar in 1719.

This interlocutor was submitted to your Lordships review upon the evidence then in process: But upon supposition of your Lordships being of opinion with the Lord Ordinary, that these were not sufficient to instruct Innes and Clark's intromissions with these rents prior to the 1719, he prayed warrant from your Lordships for searching the repositories and papers of the deceased William Campbell, the sheriff-clerk of Caithness, who had been factor for Innes and Clark, and levied the rents for them of these lands of Wester Cannisby, as also for recovering the account-books, and other writings of the deceased Alexander Frazer, relative to his intromissions with the rents of the said lands, prior to the said pe-

Feb. 15. 1770. riod. Accordingly your Lordships, by interlocutor of this date, adhered to the Lord Ordinary's interlocutor; but remitted to his
 Lordship

Lordship to grant warrant for inspection of William Campbell's papers, and to transmit to the clerk of this process what writings shall be found relative to Clerk Campbell's intromissions, prior to said year 1719, and for recovering the account-books, and other writings of Alexander Fraser, relative to his intromissions with the rents of these lands, and to hear parties procurators upon what further the petitioner condescends upon, and offers to prove, relative to the intromissions of Innes and Clark with these rents.

In consequence of these interlocutors a number of material papers were recovered; particularly a continued train of letters from Alexander Clark to the said William Campbell, from the 3d April 1711 to the 19th of October 1714, and a number of accounts and jottings, mostly of the hand-writing of the said William Campbell himself, or of his son James, authenticated by William; with all which the Lord Ordinary made avifandum: And as from these there appeared the most complete and undeniable evidence of Clark and Innes having entered into possession, by levying the rents of crop and year 1709, that is, immediately upon their getting the assignation from Plaids, your Lordships pronounced the following interlocutor. " On report of the Lord Gardenston Or-
" dinary, and having advised informations given in, the Lords
" find the pursuer accountable for the rents of the lands of West
" Cannisby for crop 1709, and subsequent years; and remit to
" the Lord Ordinary to proceed accordingly." And your Lord-
ships were pleased to refuse a petition reclaiming against this inter-
locutor. Nov. 29. 1770

During the recess of the Christmas vacation immediately subsequent to the date of these interlocutors, the petitioner accidentally discovered, in the false bottom of an old trunk, several writings which threw much light upon the matters in controversy betwixt the parties; and accordingly upon this new evidence another reclaiming petition was presented to your Lordships, praying to find the pursuers accountable for the rents of the lands of Cannisby since the 1694. Dec. 18. 1770

And, posterior to the presenting of this petition, the petitioner having discovered that a process of reduction and improbation was raised by the pursuers authors, Innes and Clark, against the Earl of Cromarty, who purchased part of the estate of Mey in 1710, and that a submission was afterwards entered into between Innes and Clark, and the Earl, but to which Cuthbert of Castlehill:

hill was no party, the petitioner therefore made an application to your Lordships for a diligence against Mrs Dunbar's doer, and others; which, after an obstinate struggle on the part of Mrs Dunbar, was granted, and the writings called for recovered, and the conclusions which occurred to be material for the petitioner's argument, as arising from these writings, were laid before your Lordships in an additional petition.

Feb 28. 1771. Upon advising both these petitions, with the answers thereto, your Lordships pronounced this interlocutor. " Having advised this petition, with the answers, together with the additional petition for Alexander Cuthbert, and the answers; in respect of the new evidence produced, find the original petition competent, and find the pursuers liable for such of the rents of the lands of Cannisby, due betwixt the year 1694 and 1709, as were payable by the tenants who shall appear to have been in possession at the 1709; and remit to the Lord Ordinary to proceed accordingly."

Against this interlocutor both parties reclaimed; the pursuers praying your Lordships " to alter your interlocutor of the 28th of February last, and to find, that the petitioners are not liable for any of the rents of West Cannisby from the 1694 to the 1709;" and, on the other hand, the now petitioner, praying your Lordships " to find the pursuer falls to be charged in the accounting with the whole rents of West Cannisby from the year 1694, reserving to her to instruct her discharge thereof, from the desertion or removal of tenants before the commencement of her authors right, or otherwise, as the best can."

July 12 1771. Upon advising these petitions, with answers, your Lordships pronounced the following interlocutor. " Having advised this petition, with the answers, they refuse the same; and having also advised the petition of Mrs Elizabeth Dunbar and her husband, with the answers, find the pursuers accountable only for the rents of the lands of West Cannisby for crop 1709, and subsequent years, unless the defender shall instruct, that the pursuers intromitted with the said rents prior to crop 1709; and remit to the Lord Ordinary to proceed accordingly, and further to do as he shall see cause."

The petitioner must humbly submit this interlocutor to your Lordships review; which he is induced the more readily to do, because he flatters himself that some of the evidence already in process,

cess, when stated in a different light, will tend to satisfy your Lordships, that, in terms of the reservation in this last interlocutor, Innes and Clark, by themselves and factors, did actually intromit with the rents of Cannisby previous to the 1709.

The great argument by which the pursuer has endeavoured to shelter herself in this case, is the alledged improbability, that the tenants of Cannisby would be allowed to hold possession of the rents for so great a period as intervened betwixt the 1694 and the 1709. But the petitioner flatters himself this argument cannot now have any weight with your Lordships, when it has been so clearly shown, that there was no person during that period who had a right or title to exact those rents. It is unnecessary to run over the whole argument at large, which has been repeatedly stated, to prove this. It will be sufficient to mention the ground of the argument, in order to bring it back to the recollection of your Lordships.

And, *first*, with regard to Sir William Sinclair of Mey, it seems impossible to believe, that after the judicial sale of his estate in the 1694, the parties interested would ever have permitted him to interfere with the rents : for besides the process of sale, your Lordships will recollect there was a multiple-poining repeated in name of the several tenants, as well as of the creditors, upon the estate of Mey ; and that the decret of division proceeds accordingly upon the multiple-poining, and contains an express decerniture against the tenants, possessors, and other intromitters for these rents ; under which circumstances, there is no ground on earth to suppose, that Sir William Sinclair of Mey, the person himself whose estate was brought to sale, would be permitted to have the least interference with those rents. But further, although it should be supposed that Sir William Sinclair, either with or without a title, had levied any of those rents, this circumstance would of itself be satisfactory against the pursuers argument ; for it appears, as formerly stated to your Lordships, that Innes and Clark were very attentive to recover the pittance of the bygone teinds from Sir William ; and therefore it is incredible, that they would have committed altogether to recover the flock itself, if it had been intromitted with by him.

Again, it has been said, That, previous to the majority of Cuthbert of Plaids, in the 1702, the rents were levied by the Earl of Cromarty, or Mackenzie of Prestonhall, for his behoof, in virtue

of the gift of nonentry, and ward and declarator consequent thereupon, taken in the name of Mackenzie of Prestonhall, for behoof of the Earl of Cromarty, in order to found him in a plea of compensation against a debt due by the Earl to Cuthbert of Plaids. But this hypothesis cannot be supported.

It is true, that a gift of ward and nonentry duties was procured in name of Mackenzie of Prestonhall, and that a process of declarator was intended in consequence thereof; and likewise that the tenants were called as parties in the declarator, and likewise that this process was commenced as early as the 1696. But then your Lordships will likewise recollect, that although this process was insisted in during the years 1698 and 1699, there was at the same time a vigorous defence maintained by Cuthbert and his curators, who raised and insisted in a counter process of aliment: So that this process of declarator was never brought to a conclusion, nor indeed was there any calling or step of procedure from the 1699 to the 1707, when, although not finished, a most irregular extract was taken out, for the purpose of laying the foundation for a collusive decret of for coming, afterwards obtained before the sheriff of Edinburgh, at the instance of Prestonhall, against his brother Lord Cromarty, as debtor to Plaids. In this situation matters remained till the 1700, when Cuthbert of Plaids granted the factory and trust-right to Innes and Clark, the first of them bearing date upon the 15th of August 1700. So that although the citation given to the creditors in the process of declarator would undoubtedly have the effect of interpellating the tenants from paying to any other, still the process of declarator itself, for the reasons already given, was altogether unavailable to procure any payment to the Earl of Cromarty, or Mackenzie of Prestonhall.

It is, with submission, equally clear, that neither Plaids himself, nor any in his right, were in a situation to be able to uplift those rents; for the interpellation given to the tenants by the citation in Prestonhall's declarator was certainly much more than sufficient to prevent the tenants from paying to Plaids, their new master, at all hands confessed to be a poor weak indolent man, especially when engaged in a competition with the powerful family of Cromarty, whose interpellation the tenants would not chuse to disregard.

But,

But further, what must satisfy your Lordships that Plaids had no prospect at this period of recovering payment of the rents, is, the total neglect upon his part to make up any such active title in his person, as could give him any *jus exigendi* with regard to those rents. In the decret of division, the interest of Provost Cuthbert was not set off to any particular person, but in general to the representatives of Provost Cuthbert: so that something more was requisite to make up a title to prosecute that interest. But so little prospect had Plaids himself of being able to recover any of those rents, that he never gave himself the trouble to do so, nor indeed was it ever done till the rights were granted in favour of Innes and Clark; the very first act of whose administration, when they got their rights, was to make up titles in the name of Plaids, by a general service as heir to his granduncle, and an adjudication upon a trust-bond; being sensible, that all their operations would be ineffectual, till once these preliminary steps were taken. Add to all this, the decisive nature of the evidence arising from the circumstance of the decret of division never having been extracted for Plaids's behoof, till it is done by the trustees upon the 21st of February 1710, as appears from the decret itself in process: And the pursuer's hypothesis of a former extract having been taken out, has been already refuted to your Lordships satisfaction.

It was observed at last advising, That at any rate Plaids himself might have got the rents from the 1694 to the 1698, when the tenants were called in Prestonhall's declarator. But besides the circumstances already taken notice of, in opposition to such a hypothesis, arising from the confessed weakness and indolence of Plaids himself, from their being no active title in his person, nor no decret of division extracted sooner than the 1710, there is likewise another material circumstance which must not be overlooked, viz. that the decret of division, which was the sole foundation of Plaids's right, was not pronounced till February 1696; that the gift of ward, &c. was obtained in the month of June of that same year; and the first calling in Prestonhall's declarator was as early as February 1698. When the tenants were cited does not appear, because the warrants of this irregular decret cannot be found; but it is likely that the citation must have been pretty early in the 1697, when it came from Caithness, to be called so early as February 1698.

The petitioner cannot leave this point in the cause, without mentioning

mentioning again, for the consideration of your Lordships, the proceedings in the submission betwixt the Earl of Cromarty, and Innes and Clark; where the Earl, on the one hand, founds upon his right to the rent, as an article of counter claim, or compensation; and on the other hand, Innes and Clark object the nullity of the decret of declarator, "in respect no personal decerniture" could have been against young Mr Cuthbert for the rent of the "lands in Caithness; because he had neither possession nor introduction." It can scarcely be supposed, that if Plaids, or any in his right, had been in possession of those rents, such an averment would have been made in the face of the Earl of Cromarty, who knew well the fact, and would never have permitted such an answer to have been made to him.

To the same purpose, it is likewise material for your Lordships to recollect the parole-evidence arising from the depositions of George Muat, and Mr James Brodie minister of Cannisby, who swear to their hearing from some of the tenants of Cannisby, that for a certain number of years, which some of them called eleven, some thirteen, and one sixteen years, they had paid no rents.

All these circumstances evidence the proposition hitherto maintained on the part of the petitioner, that the rents of Cannisby must have remained unuplifted from the 1694 to the 1709; because, from the particular situation of the parties, there was no body *in titule* to uplift them: and all the cry of the improbability of tenants being allowed to keep possession of the rents for such a number of years must fly off when this circumstance is attended to; for surely it is not so improbable, that the rents should lie unuplifted in the tenants hands, as that they should pay them when there was no body *in titule* to exact them.

Taking it therefore for granted, that your Lordships will hold this fundamental proposition as sufficiently established, it is next to be considered, whether there is evidence, or legal presumption, sufficient to persuade you, that the pursuer ought to be liable in all or any part of those rents.

Thus far is an agreed point betwixt the parties, that Innes and Clark, in virtue of the rights which they received, had an undoubted title in their persons to uplift those bygone rents; and therefore the presumption of law and of reason is, that their own interest, and their duty in the character of trustees, would lead them

them to be diligent and attentive in levying those bygone rents, so far as they could be recovered. But the matter does not rest upon presumption; for there is evidence that so soon as the decret of division was extracted, and so soon as by means of it, and the general service of Plaids, they were in the right of those rents, Clark himself, one of the trustees, went to the county of Caithness, where he had personally communication with the tenants; and that this must have been previous to April 1711 is obvious from his letter of that date, being the first in the appendix, wherein he expressly says, "You'll get me notice how long the Laird of Mey drew the teinds: If I mind right, the tenants declared it was only two years since he gave over drawing them;" which is satisfactory evidence that he had been in Caithness, and had communication with the tenants.

This being the case, it is impossible to doubt, that at this period he would institute an account with the tenants with regard to their rents, and would levy from them the crop 1709 when due, and what of the bygoners he then possibly could. And accordingly all the accounts of charge and discharge concerning the management of Clerk Campbell, as also the jotting relative to his management, respects solely an account instituted for the year 1710, and subsequent years. But there is no mention of the year 1709, or of any preceding year. There is indeed mention made of *old rests and bygoners*; and from the mode of expression, and a variety of other circumstances, the petitioner has endeavoured to prove to your Lordships, that these accounts, making mention of old rests and bygoners, did prove an intromission by Innes and Clark with the rents previous to the 1709; and from the further view to be given of this matter, he flatters himself your Lordships will be more and more satisfied, that the petitioner is in the right in this hypothesis.

In the *first* place, It is most natural that it should be so: for as Clark himself had been in Caithness previous to April 1711, and all that time had intercourse with the tenants, he certainly would levy from them whatever was sufficient to pay the rent of the year 1709, as also what bygoners he could recover out of their hands; and what of these bygoners he could not recover upon this clearance with his tenants, he would unquestionably leave with his factor, in order to be recovered by him as he best could.

E

And

And as such was the natural conduct of Clark when he left Caithness; so, in like manner, Campbell, in making up his accounts, or transmitting information to the trustees relative to the rents of Caithness, fell naturally to make a distinction betwixt the rents for the year 1710, and subsequent years, falling under his own proper management and factory, and as to which Provost Clark had instituted no clearance with the tenants, and the arrears or bygone rents arising upon the face of the accounts or clearances, which Provost Clark himself had instituted with the tenants. In short, whatever Clerk Campbell should receive from the tenants, he fell to apply, in the first place, to the extinction of the rents of the 1710, and subsequent years, which it was his own business to levy; and if there was any overpayments made, more than sufficient for that purpose, these fell to be applied in extinction of the old rents or balance still outstanding upon the clearance betwixt the tenants and Provost Clark himself.

Accordingly, upon looking to the accounts and jottings as contained in the appendix, which have been so often stated to your Lordships, they appear to bear real evidence upon the face of them, that such was the mode of making up these accounts. These old rents cannot apply to the years 1710, 1711, 1712, 1713, and 1714; because the rents of these years are expressly mentioned as paid, and are set in opposition to the old rents still remaining. Neither can they apply to the years 1715 and 1716; because the accounts do likewise make mention of the old rents or bygones, as contradistinguished to the years 1715 and 1716; and which two years are always mentioned with precision, as being either due in whole or in part.

As little can any of the year 1709 be understood as contained in the expression of *old rents*. First, Because Provost Clark himself having been at Caithness after the year 1709 fell due, he certainly would take care, in the clearance he made with the tenants, to recover from them, so long as his hypothec remained, the rents for the year 1709: and although he might not be able to recover from them all the bygones, and of course would be obliged to leave these under the name of *rents* or *bygones*, to be recovered by the factor Clerk Campbell. And further, the petitioner had occasion formerly, and must still beg leave to bring under the particular view of your Lordships, one of those jottings, which clearly prove, that this expression of *old rents*, or *bygones*, had no relation

to the year 1709. The jotting alluded to is that respecting Donald Williamson, who is represented as being only resting the victual-rent 1715 and 1716, and the Martinmas debt 1715. And besides this, he is represented as likewise owing thirteen bolls old rests. Now, your Lordships will observe, that this must respect some arrears arising upon an average-account, and cannot arise from the years 1709, or any one year: for thirteen bolls is four bolls more than a whole year's victual-rent; and therefore, if it had related to the years mentioned in this memorandum, it would run, that he was due the victual-rent 1714, 1715, and 1716, and four bolls of arrears; but the manner in which it is stated does, with submission, evidence the petitioner's hypothesis, That this expression of *old rests* does not relate to the year 1709, which Provost Clark himself had levied, nor to the year 1710, or subsequent year, levied by Clerk Campbell, but is expressive of the remainder of the balance which was unpaid by the tenants at the time they instituted their account with Provost Clark relative to the by-gone rents previous to the year 1709.

But the petitioner must now call the attention of your Lordships, in corroboration of the arguments last offered, to the abstract or analysis of the accounts of Clerk Campbell, hereto subjoined for your perusal. This abstract, the petitioner, without the aid of his agent or counsel, has made out with much pains; and upon a due attention to it, your Lordships will perceive, that, at one view, it presents a *vidimus* of the quantum of rent payable by the tenants therein mentioned, together with the victual actually paid by them during the period of the 1710, and subsequent years; and upon one and all of them it will be observed, that the amount of the payments made, do considerably exceed the quantum of the rents payable for those years, for which alone they visibly obtain a discharge. And this fact being established, it suggests several considerations material to be attended to in support of the petitioner's argument.

In the *first* place, It destroys the idea of the old rests mentioned in those accounts being in any degree relative to balances arising from the year 1710, or any other for which then accounted; for if, upon comparing the rent actually due, with the victual actually paid during these years, it shall evidently appear, that those rents are considerably overpaid, it necessarily follows, that those overpayments and old rests must arise from arrears of other years.

2dly,

2dly, It shows, that, agreeable to the hypothesis maintained by the petitioner, there must have been a previous clearance with Provost Clark for the year 1709, and proceedings; and that the old rents, or by-gones, mentioned in Clerk Campbell's accounts, respect a balance arising upon these clearances, which were instituted betwixt the tenants and Provost Clark himself.

3dly, It is thereby instructed, in terms of the reservation of your Lordships interlocutor, that the pursuers, or those in whose right they stand, had intromissions with the rents previous to the 1709; for the amount of the overpayments appearing upon the face of the abstract hereto subjoined, do necessarily carry the payments of the tenants considerably back into those years preceding the 1709.

And these facts being established, the consequences arising from them, as applicable to this cause, will obviously occur to your Lordships. It does not seem to admit of any doubt, that if the petitioner is well founded in the calculation he here exhibits, the pursuers, over and above the rents from the 1709, to which they are already subjected, must be further subjected to account for the overpayments here specified, which run back into years previous to the 1709. But, with great submission, this is not the only consequence into which those facts must lead: They ought to have the effect of subjecting the pursuers to account for the rents from the 1694 down to the 1709; as to which, they had an undoubted good title to intromit, unless in so far as it shall be shown, that the trustees were not in a situation to recover those rents, either from the desertion, the removal, or the bankruptcy of tenants, previous to the commencement of the right of the trustees.

It is a mistake to say, That the petitioner is here endeavouring, contrary to the tenor of their trust-right, to subject the trustees for omissions. When a deed exempts trustees, factors, curators, or any other manager, from the necessity of accounting for omissions, no more is thereby meant, than that they shall not be liable for exact diligence, or for that care and management which a prudent man is expected to show in his own affairs: But it was never thereby understood, that a person was exempted from the necessity of keeping or producing any account whatever; for if such a doctrine shall be admitted, it is an end of all management and administration of every kind. The most unfaithful trustee, factor, or curator, would have no more to do than to produce no account
whatever,

whatever, and plead, that they were not liable for, but excused from all omissions. But the petitioner is advised, that the exemption from being liable to omissions, means no such thing; it means no more, than that they shall not be liable for that exact management, or diligence, which, by undertaking the management of another's affairs, they would otherwise be understood liable for, if such an express exemption did not take place.

If therefore the petitioner is right in those principles, it will occur to your Lordships, that under the clause of not being liable for omissions, the pursuers cannot be excused from the accounting which the petitioner demands at their hands. He has instructed, that they were *in titulo* to demand the bygones previous to the 1709: He has instructed, that *de facto* they did receive those bygones to a considerable amount: He has laid before your Lordships the most rational grounds to presume, that Provost Clark, at a previous clearance, had received them to a still greater amount, and that it was in supplement only of what he received, that the balances wanting to pay the whole of these bygone rents were settled in the form under which they appear, and did remain under the name of old rests or bygones, until entirely cleared. All this being instructed, he certainly cannot be understood to make any unreasonable demand, when he only asks of the pursuers to give some account of the matter, or to show, that they did not receive the whole of those rents, on account either of the removal, the desertion, or the bankruptcy of tenants, or from any other cause whatever, sufficient to excuse from the accounting for those rents, whether such excuse be founded upon accident, or an excusable omission on the part of the trustees.

If the petitioner is in the right in those principles, he need scarcely add, that at least your Lordships will see cause to return to your former interlocutor, finding the pursuers liable to account for the whole bygone rents of those tenants who were in possession in the 1694, and continued likewise to be so in the 1709. It can scarcely be credited, that if those tenants had either been unable or unwilling to restore their rents, Clark and Innes would have allowed them to remain in possession; and therefore, although the petitioner should be unsuccessful in satisfying your Lordships as to any other particular, he hopes at least your Lordships will see cause to give him that partial relief afforded by the interlocutor previous to the one now brought under review.

When the cause was last under the consideration of your Lordships, it was observed to be a circumstance operating strongly against the petitioner, that Castlehill, in the action he brought against Innes and Clark in the 1713, did not charge them with any intromissions prior to the 1710; and that in the action which he brought in the 1732 against their representatives and Sir Patrick Dunbar, he only concluded for crop 1711, and seven subsequent years; and in the submission into which he entered with him in 1733, he did not pretend that Innes and Clark had intromitted prior to the 1711, as also that George, the son of John Cuthbert of Castlehill, in an action which he raised in 1734, concludes in like manner only for crop 1711 and subsequent years.

But this argument is founded upon mis-stating the nature of the different proceedings. For the first action, which was raised in the 1713, and was afterwards revived in the 1720, concludes only, that the trustees should account for their intromissions in general, without mention of any period of possession. The summons in 1732 is the first which mentions the 1711, and that in a conclusion against Sir Patrick Dunbar, jointly with the heirs of the trustees. But it contains another separate conclusion against them for the sum of 50,000 merks, which was more than sufficient to comprehend the intromissions prior to the 1711. As to the submission, there is not in the procedure upon it a word as to intromissions, and the extent of them. Nothing was done by the parties, but to object to each others debts. As to the summons 1734, it is merely a transcript of that in 1732; and the conclusion is directly against Sir Patrick Dunbar from the 1711: So that it is plain he was considered to be in possession from that period, which his connection with Clark naturally led people to believe, and that he had intromissions prior to the 1710. The date of his right from Innes and Clark appears from Clark's letters to Campbell, and Campbell's jottings, which bear parcels of victual at different times to have been delivered to Bourmadden. As Sir Patrick did not represent Innes and Clark, he could only be liable for those during the time which he actually possessed; and therefore it was necessary to fix a period against him. But it was not so with regard to the heirs of Innes and Clark; and therefore a lump sum is libelled against them.

It only further remains to take notice, that, from certain writings

tings some time ago exhibited by David Lothian, the pursuers doer, in consequence of an order of court, it having appeared, that the deceased John Stuart, writer to the signet, was the agent and doer of Innes and Clark, the trustees from the commencement of the trust in 1709 till the 1721; and that the said John Stuart had in that year delivered up to Ludovick Brodie, as doer for Sir Patrick Dunbar, the several writings which belonged to Innes and Clark, conform to inventories; the petitioner lately applied to Miss Marjory Stuart, the daughter of the said deceased John Stuart, to see if she could discover the inventories and receipts amongst her father's papers

Miss Stuart having accordingly discovered the inventories, it naturally occurred to the petitioner, that the correspondence of the trustees with their doer at that period, and the account of his law-debursments for their behoof, might throw light upon the management of the trustees, and amount of the subjects recovered by them; and therefore it was recommended to Miss Stuart to make a search for these letters of correspondence, and her father's account-books, which she informs are accordingly extant, and have been discovered by her. But Miss Stuart being connected with some particular friends and agents of the pursuers, to whom she happened to mention the application made to her for making the above searches, the petitioner has good reason to believe, that no paper discovered by her, either has or will be voluntarily communicated to him, without the approbation of the pursuers, who can very well suggest such of them as can be shown without any hazard to them, and such others as may be more proper to keep up; and as it is very probable, that some of these letters, accounts, and other writings, in Miss Stuart's hands, might throw further light upon the intromissions of the trustees, it is submitted, if the petitioner should not be indulged with a diligence, in order to have them exhibited upon oath; and this can be attended with no delay, and the diligence can be execute in a few hours, Miss Stuart and the papers being in town.

May

May it therefore please your Lordships, to alter the interlocutor complained of, in so far as it finds the pursuer only liable to account from the year 1709; and in respect the petitioner has instructed the intromission of the trustees with the rents previous to the 1709, to find her liable to account from the year 1694, when Plaid's right to the rents of Cannishy commenced; or, 2do, At any rate, to find them liable to account for these rents mentioned in Clerk Campbell's accounts, which are more than sufficient to pay the rents of the years mentioned in those accounts, and must therefore have been levied on account of bygones due, previous to the 1709; or at least to find, That the pursuer is liable to account for the rents prestable by the tenants who appear to have been in the possession in the year 1694, and to have remained so in the 1709; or if any difficulty shall still remain, to grant diligence for the examination of Miss Marjory Stuart, or to give such other relief in the premisses, as to your Lordships shall seem meet.

According to justice, &c.

HENRY DUNDAS.

A B-

ABSTRACT of PAYMENTS.

Taken from the writings of Clerk Campbell, factor on the estate of West Cannisby, and made by the tenants of said estate, as per letters, per receipts, per several jottings of Campbell on detached sheets, and per his Blotter, whereof the first leaves have been torn off, and lost, as far down as the year 1712.

[The payments are set down in the same order as in the Appendix to the Information for the petitioner, of August 2. 1770, containing these writings.

It is remarkable, that none of the tenants payments, either with or without their *old rests*, do tally with the rents for which they get discharge; which is a proof, that the jottings of some payments have been torn out of the blotter, as also the jotting of first state of old balances or rests. These last jottings could alone explain the now mangled accounts of Campbell, the tenants heteroclitous rests, and the invisible discharges of their overpayments.]

1. Peter Swany paid yearly for his farm of five octos, seven bolls two firlots, and owed thirty-seven bolls two-firlots for the years 1710, 1711, 1712, 1713, and 1714, for which quantity alone he gets a visible discharge, p. 6. Appendix.

	B.	f.	p.
Peter Swany delivered to Campbell crop 1710, though this payment, with others, have been torn out of the Blotter, it is proven per Provost Clark's letters of May and September 1711, Appendix, p. 6.	7	2	0
Ditto delivered to minister of Cannisby per receipt, June 1716, p. 6.	6	3	2
Ditto shipped crop 1714, per No 17. p. 9.	7	2	0
Ditto delivered to Bowermaden, per No 23. p. 11.	7	0	0
Ditto paid to Campbell, per Blotter, No 25. which is the first payment preserved therein, and without date, p. 12.	6	0	0
Ditto paid to ditto, July 1712, per idem, omitted in printing the Appendix, p. 12.	9	0	0
Ditto paid to ditto, 15th August, per idem, p. 12.	1	0	0
Ditto paid to ditto, July and August 1712, per idem, 10 bolls, p. 12, although it is not said, that this is the same as the two preceding articles, yet, to prevent dispute, it shall not be stated.			
Ditto got deducted to him for malt-making, per idem, and per Provost Clark's letter July 1713, No 10. p. 3. and p. 13.	1	1	0
Carried forward,	46	0	2
G			

	B. s. p.
Brought forward, -	49 0 2
Provoit delivered to Campbell in malt, per Blotter, p. 12. -	8 3 0
Ditto delivered to Wypper Mechanics sh p. per No 27, p. 16. -	6 2 0
Part of Peter Smeets's payments, as per the above vouchers, -	61 1 2
Discharged in a valid manner only the virtual-rent of the said five years, without interest of old debts, -	37 2 0
Overpaid, but discharged in an invalid manner, -	23 3 2

2. David Williamson paid yearly for his farm of six ephas, nine bolls victual, and one for the years 1710, 1711, 1712, 1713, and 1714, forty five bolls, for which there has been a whole discharge, with a reserve of thirteen bolls *in exp.* p. 16.

	B. s. p.
David Williamson delivered to Clerk Campbell crop 1710, per Provoit Clerk's letters of May and September 1711, though torn, with others, out of the Blotter, Appendix, p. 1. -	9 0 0
Ditto delivered to minister of Camblay, per receipt June 1710, p. 6. -	4 1 2
Ditto left crop 1714, p. 6. per No 17. -	7 2 1
Ditto delivered to the vicarage, per No 23, p. 11. -	6 0 0
Ditto paid to Campbell, per Blotter, which is the first payment mentioned therein, because torn, p. 12. -	5 0 0
Ditto paid to ditto 15th August, per Blotter, p. 12. -	7 3 0
Ditto paid to ditto, July and August 1712, per idem, p. 12. 7 bolls 3 firlots, not stated, to prevent dispute. -	
Ditto per delivered to him for malt making, per idem, p. 13. and per Provoit Clerk's letter July 1713, No 10, p. 3. -	1 0 0
Ditto delivered to Campbell in malt, per Blotter, p. 13. -	6 3 0
Ditto delivered to Wypper Mechanics sh p. per No 27, p. 16. -	5 2 0
Ditto remains charged with 13 bolls <i>old refts</i> , p. 7. -	13 0 0
Total David Williamson's payments as per the above vouchers, -	65 3 3
Discharged validly only the virtual for said five years, -	45 0 0
Overpaid, including 13 bolls <i>old refts</i> not due. -	20 3 3

3. Thomas Dunet's farm was of five octos during 1710, 1711, and 1712, and of one octo more during years 1713 and 1714; at seven bolls two firlots for the three first years, and at nine bolls for the two last. He owed, for the five above-mentioned years, forty bolls two firlots; for which alone he gets a visible discharge, with a reserve of six pecks for *bygones*. p. 7.

	B.	f.	p.
Thomas Dunet delivered to Clerk Campbell crop 1710, per Provost Clark's letters of May and September 1711, though torn, with others, out of the blotter, Appendix, p. 1.	7	2	0
Ditto delivered to the minister of Cannisby, per receipt, June 1716, p. 6.	6	3	2
Ditto shipped crop 1714, per No 17. p. 9.	8	0	0
Ditto delivered to Bowermaden, per No 23. p. 11.	7	3	0
Ditto delivered to Campbell, per first payment, marked in Blotter, No 25. p. 12.	6	0	0
Ditto paid to ditto July 1712, per id. omitted in printing, p. 12.	9	0	0
Ditto paid to ditto 15th August, per id. p. 12.	1	0	0
Ditto paid to ditto July and August 1712, per id. p. 12. 10 bolls, not stated, to prevent dispute.			
Ditto got deduced to him for malt-making, per id. p. 13. and per Provost Clark's letter, July 1713, No 10. p. 3.	1	1	0
Ditto delivered to Campbell in malt, per Blotter, p. 13.	8	3	0
Ditto delivered to Skipper Mackenzie's ship, per jotting, No 27. p. 16.	6	2	0
Ditto remains charged with 6 pecks for <i>bygones</i> , p. 7.	0	1	2
Total Thomas Dunet's payments, as per the above vouchers,	63	0	0
Discharged visibly only the victual for said five years,	40	2	0
Overpaid, including 6 pecks <i>bygones</i> still due,	22	2	0

4. Matthew Dunet paid yearly for his farm of five oelos, seven bolls two firlots virtual, and owed for the years 1710, 1711, 1712, 1713, and 1714, thirty-seven bolls two firlots; for which alone his widow gets a visible discharge, with a reserve of four bolls one firlot two pecks old farm, p. 7.

	B.	f.	p.
Matthew Dunet delivered to Clerk Campbell crop 1710, per Provost Clark's letters of May and September 1711, though torn, with others, out of the Blotter, Appendix. p. 1.	7	2	0
Ditto delivered to minister of Canabby, per receipt November 1712, p. 6.	4	1	0
Ditto delivered to ditto, March 1714, per receipt, p. 6.	5	3	2
Ditto listed of crop 1714, per No. 17, p. 9.	0	2	0
Ditto delivered to Bowerheaden, per No 23, p. 11.	5	0	0
Ditto paid to Campbell, per Blotter, on the first leaf thereof, preserved though torn off, and immediately before July 1712, p. 12.	5	0	0
Ditto paid to ditto, 13th August, per id. p. 12.	8	0	0
Ditto paid to ditto, 15th August, per id. p. 12.	1	0	0
Ditto paid to ditto, July and August 1712, per id. p. 12. 9 bolls, not stated, to prevent dispute.			
Ditto not deducted to him for malt-making, per id. p. 13, and per Provost Clark's letter, July 1713, No. 1, p. 3.	1	1	0
Ditto delivered to Campbell in malt, per Blotter, p. 13.	7	2	0
Ditto delivered to Skipper Mackenzie's ship, per Blotter, p. 16.	0	2	0
Ditto remains charged with 4 bolls 1 firlot two pecks <i>old farm</i> , p. 7.	4	1	2
Total of Matthew Dunet's payments, as per the above vouchers,	57	3	0
Discharged visibly only the virtual for said five years,	37	2	0
Overpaid, including 4 bolls 1 firlot 2 pecks, old farm, still due,	20	1	0

This analysis of the articles of virtual, delivered by the four above tenants, is sufficient to prove great overpayments; which, if needful, might be equally verified in their payments of money, as likewise in the payments of the other tenants.

A N S W E R S

FOR

Mrs. ELIZABETH DUNBAR, lawful daughter
of Sir Patrick Dunbar of Northfield, and
JAMES SINCLAIR of Duran, Esq; her husband,
for his interest;

T O T H E

PETITION of ALEXANDER CUTHBERT, Esq;

GEORGE Viscount of Tarbat, afterwards Earl of Cromarty, having purchased, at a judicial sale, part of the estate which belonged to Sir James Sinclair of Mey, was decreed by the decret dividing the price, to pay to those having right to two apprisings affecting that estate, led at the instance of Alexander Cuthbert, provost, and Alexander Dunbar, merchant in Inverness, the sum of 5154 l. 15 s. 10 d. with that of 331 l. both Scots, and interest from Whitsunday 1694, and in time coming during the not-payment. July 1694
February 21,
1695

William Innes, writer to the signet, who purchased another part of the estate for the behoof of Mr. Sinclair of Ulbster, was in like manner decreed to pay to the same persons, the sum of 1071 l. 12 s. 4 d. Scots, with interest from Whitsunday 1694.

The rest of the estate in Caithness did not find a purchaser, and therefore was divided among the creditors; and by the decret of division, of this date, there was allotted to those having right to the foresaid two apprisings, the three penny three farthing and an half octo of the lands of West Cannisby, holding of the crown, scarcely yielding 300 merks of yearly rent. and said to be possessed by the following ten tenants therein named, viz. Patrick Swan-

A

die,

nie, William and George Brebners, Donald Williamson, William Johnston, William Bernardson, Hóbel Roslie, William Dunnet, John Manson, and Margaret Thomson.

The foresaid apprisings, were originally led in 1664, at the instance of the said Alexander Cuthbert and Alexander Dunbar; but Dunbar having, in 1676, made over his apprising to Alexander Cuthbert, both apprisings came afterwards into the person of the deceased John Cuthbert of Plaids, grand nephew and heir of the provost.

Plaids came very soon to be reduced to great distress, on account of the debts he owed, and which was greatly occasioned through the mismanagement of his curat^r George Cuthbert of Castlenhill. In this situation, the deceased Robert Innes of Mondole, and Alexander Clark, baillie of Inverness, interposed their credit for his relief, as well from compassion, as from regard to his deceased father. It appears, that it was by their means that he was saved from rotting in jail, as none of his other friends would advance any thing for his relief; and as they, in this way, became considerable creditors to Plaids, and were most justly entitled to be secured of their re-imbursement, so it appears, that, of this date, the said John Cuthbert of Plaids, in the character of heir served and returned to the said Provost Cuthbert his grand uncle, and for *certain very onerous causes and considerations*, granted a deed, in the form of an *irrevocable* factory, in favour of the said Robert Innes and Alexander Clark, containing an obligation to grant a deed in their favour in more ample form, and to deliver the necessary writings therewith. This factory, appears not to have taken effect, and must have been returned to Plaids, as the same was never recorded, and the principal itself, was produced by the defender in this process, who no doubt must have found it amongst the papers of his author John Cuthbert of Plaids.

August 15,
1719.

October 21,
1719.

Plaids did afterwards, of this date, execute a disposition in favour of Innes and Clark, of the apprisings against the estate of Mry, with the thirds of the price, and lands allocate thereto; as also assigned them to the sum of 6000 merks, with penalty and annuallent, constituted in a bond of provision, said to be granted by Sir James Dunbar of Hemprigs, to M^{rs}. Katharine Sutherland, spouse to the said John Cuthbert.

As

As this last mentioned deed, was considered to be incomplete, the said John Cuthbert, by a disposition of this date, which nar-^{January 30,}
 rates the foresaid disposition, did, in further corroboration of the ^{1710.}
 same, convey to the said Messrs. Innes and Clark, the foresaid two
 decreets of apprising, with the lands and estate thereby adjudged,
 lying in the shires of Ross and Caithness. This disposition con-
 tains an assignation to the mails and duties of the *baill* lands con-
 tained in the apprisings thereby conveyed, of all years and terms
 bygone resting unpaid, and yearly and termly in time coming; as
 also a clause of delivery in the following terms: "Likeas I have
 "herewith delivered to the said Mr. Robert Innes and Alexander
 "Clark, the *baill* writs and evidents of and concerning the pre-
 "misses, conform to an inventory thereof apart, to be subscribed
 "by me and the said Robert Innes and Mr. Alexander Clark mu-
 "tually." So that it is evident that *all* the writings relative to
 these apprisings, as well as an extract of the decreet of division be-
 fore mentioned, which is specified in that conveyance, must have
 been then only delivered up; but the foresaid bond of provision
 for 6000 merks, is not so much as mentioned in this deed, and ap-
 pears never to have been delivered to Innes and Clark.

And in order the more effectually to vest the subjects, and to
 compleat titles thereto in the persons of Innes and Clark, it
 was thought proper, that Plaids should at the same time
 grant them a bond for 50,000 merks, for the purpose of leading
 an adjudication against himself, on a charge to enter heir to his
 grand-uncle Provost Cuthbert, which accordingly was done, by
 decreet of adjudication of this date.

These conveyances were *ex facie* absolute and irredeemable, and
 therefore Innes and Clark, by their back-bonds, of even date with
 the said two dispositions, subsuming, "That albeit the same did
 "bear to be granted for an onerous cause, yet that they were
 "granted to the said Robert Innes and Alexander Clark, partly as
 "a *security* to themselves, and partly in trust, in order to ma-
 "nage the said John Cuthbert's affairs, *upon the terms and condi-*
 "*tions under written*;" did therefore become bound to render an
 account to Plaids, his heirs and assignees, of all sums that they
 should receive by virtue of the dispositions and bond before men-
 tioned; but it was thereby specially provided, that out of the first
 and readiest of any sums that they should recover, they should
 be

June 29,
 1710.

be allowed *to retain in their own hands*, as much thereof, as would satisfy and pay them all debts and sums of money due by Plaids or his father and grand-uncle, which they either had already satisfied and cleared, or should thereafter satisfy and clear, with all sums of money, which they either had already advanced, or should advance to Plaids himself, or which they had expended, or should expend, in making the subjects effectual, together with a competent salary for their pains in paying the said John Cuthbert his debts, and managing his affairs, and they being once fully satisfied and paid of all the said sums expended, and to be expended, by them, the *overplus*, if any, was to be paid by them to Plaids and his forefairs.

It was farther provided, " That they should only be accountable *according to their intrusions*, and whatever they should accept, receive or take by virtue of the said rights; but that they should *not be liable for omissions*, and should not be prejudged or limited by the back-bonds, in the power and faculty given them by the foresaid dispositions, of disposing of the subjects disposed, at pleasure."

It appears from the vouchers produced in process, that Innes and Clark had, prior to the date of the last mentioned disposition, in January 1710, advanced considerable sums to and for the said John Cuthbert, besides their other engagements for him to his creditors, in order to relieve him from jail.

Dec. 8,
1709.

And the said John Cuthbert, by his declaration and obligation, of this date, reciting that Innes and Clark had transacted several debts due by him, and accumulated the principals, annualrents and expences, in the bonds and transactions granted by them thereanent, and which accumulate sums bore annualrent from the respective times of their transactions; and subsuming, " That it being reasonable that the said Robert Innes and Alexander Clark, should be no losers thereby, *especially seeing the funds made over by me for their relief and repayment, have not yet answered, and will take some time e'er they be made effectual*; and it being also reasonable for the same cause, that such money as they advance to myself, from time to time, in borrowing, should also bear annualrent from the several times of advancement thereof;" therefore he thereby became bound to allow them annualrent for the sums which they had transacted and paid,

paid, or should transact and pay for him, as well as for the sums lent, or to be lent by them to him, and that from the time of the advancing thereof.

Innes and Clark, trusting to the security granted by the foresaid deeds, and expecting they would be able to make the money thereby conveyed effectual, proceeded and continued in clearing Blads's debts; and they are proved by vouchers produced, to have advanced and paid for him sums, which, with the interest from the respective periods of a vance down to this day, will amount to upwards of 2000 l. sterling.

It is obvious that until the last mentioned disposition in January 1710, when, and no sooner, the writings relative to the premises were delivered over to them, Innes and Clark could take no effectual step towards recovering any of the subjects so conveyed to them; and accordingly they did all in their power to recover the money from the Earl of Cromarty and William Innes; for, of this date, they preferred a petition to the court of session, praying warrant for registering the bonds for the shares of the price of the estate of Mey, purchased by the Earl and Mr. Innes, and falling to the foresaid two appraisings. July 29, 1710.

This application was opposed both by the Earl and Mr. Innes; and it was particularly set forth in the answers on the part of the Earl, that he was creditor to John Cuthbert, in sums equivalent to what he was preferred to, out of the price of the lands purchased by the Earl; and, of this date, the court, upon advising the petition and answers, were pleased to refuse the desire thereof. July 29, 1710.

Thereafter Innes and Clark made several attempts to settle matters amicably with his Lordship, and actually entered into a submission with him for that purpose; but as the Earl died in the year 1714, this submission did not take effect. Innes and Clark afterwards attempted to get matters settled with his son John Earl of Cromarty, but the confusion of his affairs rendered this attempt abortive. However, these steps, although they had not the effect of recovering payment, yet they had the effect of preserving the claim from being lost by prescription, and accordingly they were the only documents of interruption, that were afterwards founded upon, in answer to the plea of prescription insisted upon by his Majesty's Advocate, in the course of discussing the claim that was entered

entered for these debts, upon the forfeited estate of Cromarty, subsequent to the rebellion 1745.

Nov. 24.
1745.

Innes and Clark, of this date, appear, from evidence now produced, to have received from William Innes, the sum of 1071 l. 12s 4 d. Scots, with interest thereof from Whitsunday 1694, extending in whole to about 2000 l. Scots; but it appears from documents in process, that Innes and Clark had, prior to *this* period, advanced to and for John Cuthbert, sums amounting to upwards of 5000 l. Scots.

Nov. 21.
1745.

The said George Cuthbert of Castlehill, appears to have acted as sole curator for Plaids, upon expiry of his pupillarity, which happened in the 1696, the year in which the decret of division before mentioned, was obtained. As Castlehill had never rendered an account of his intromissions, and his management had been most gross, an action of count and reckoning at Plaids's instance, was, in the year 1743, brought against him before the court of session; but Castlehill, aware of the consequences of the action, and conscious of his mal-administration, had the address, previously, of this date, to impetrate from Plaids, a discharge of his intromissions, and of all demands.

This discharge was procured and signed at Inches, an obscure place in the country *remotis arbitris*, and without any friend being present on behalf of Plaids, or even acquainted with the affair, and did not make its appearance for some time in the fore-said process; and no wonder Castlehill was unwilling to found upon it, considering the manner in which it was obtained. However after the process of count and reckoning had gone on for some time, it was produced, and it put an end to the action.

Jan. 17.
1746.

Castlehill, however, not contented with the advantage he had thus gained, had also the address to obtain from Plaids, in name of his son John Cuthbert of Castlehill, father of the defender, an assignation of this date, of the for-aid back-bonds granted by Innes and Clark, and to the power thereby given to Plaids, of calling them to account for their intromissions.

But none of the grounds of debt, for security and payment of which, this assignation is said to be granted by Plaids, have been produced in this process by the defender; and notwithstanding that old Castlehill, the father, was alive at the time, yet the assignation

nation is taken to John the son, though he had no right in his person to those pretended debts.

Castlehill's right therefore, for any thing that yet appears, seems to have been very suspicious, and without any just foundation; and the assignation that was lately taken from Plaids's daughter, is a corroborative proof of it. Nor does that assignation mend the matter much, because the woman was extremely poor, of whom her straits rendered it very easy to take the advantage; and the only value pretended to be given for it, was a promise of 50 l. sterling, to be paid after receiving the money from the crown, a consideration by no means adequate to the large sums thereby given away, and consequently deserving no favour.

Alexander Clark, one of the original disponees, having been nominated executor to the deceased Mr. Robert Frazer advocate, Sir Patrick Dunbar, the respondent's father, became cautioner for him in the confirmation, and he was thereafter decerned, particularly by a decret-arbitral standing on record, pronounced by the late Lord Elchies, to pay very considerable sums for Clark on account of that cautionry. Clark therefore did, as he was bound to do, dispone and make over to Sir Patrick Dunbar, his heirs and assignees, the two apprisings aforesaid, and all following thereon, the decret of division, and sums thereby due, with the foresaid lands of West Cannisby, and mails and duties thereof, from Whitsunday 1719. Octob. 21. 1719.

Thus Sir Patrick Dunbar acquired full right to all the interest which Clark had in the foresaid debt; and as Clark had been obliged to pay for Innes, the other disponee, very large sums, of which he was entitled to relief, these Clark did also, by assignation of the same date, make over to Sir Patrick, on which Sir Patrick obtained himself decerned executor-creditor to Innes before the commissary of Moray, and having charged Jonathan Innes, eldest son and apparent heir of the said Robert Innes, to enter heir to his father, he obtained a decret *cognitionis causa*, and the respondents, as in the right of Sir Patrick, did afterwards obtain a decret of adjudication. *contra hereditatem jacentem*. Nov. 1. 1719.

Sir Patrick did, soon after acquiring the right, intimate the same to the Earl of Cromarty, as appears from an instrument of intimation, of this date, produced. Feb. 1. 1720.

Sir

Sir Patrick, likewise took other steps for recovering the money, and more particularly he, in 1733. entered into a submission with the Earl of Cromarty, to which Castlehill was a party; but the Earl, who had the money to pay, endeavoured, as well as Castlehill, to protract the decision, and the submission was at length allowed to expire. The embarrassed situation of the affairs of the family of Cromarty, prevented Sir Patrick from recovering his payment, and the Earl was at length forfeited on account of his accession to the rebellion 1745.

John Cuthbert of Castlehill, having acquired right to the backbonds in manner above mentioned, did, in the year 1713, commence an action against Innes and Clark, to account for their intrusions, in which however he did not think proper to insist.

He afterwards, in 1732, after the death of Innes and Clark, and also of Plaids, brought an action against the representatives of Innes and Clark, and Sir Patrick Dunbar, their assignee, for denuding in his favours, and concluding only *for payment of the rent of the lands of West Cannisby from the crop and year 1711, and since*; and also against the Earl of Cromarty and the representatives of William Innes, for payment of the shares of the price of these parts of the estates of Mey severally purchased by them.

This process was called, but never insisted in. However, in the year thereafter, his son, George Cuthbert of Castlehill, became party to the submission already mentioned, but upon which no determination followed: and upon the blowing up of this submission, the said George Cuthbert of Castlehill raised a *new* action in 1734. in the same terms with that raised by his father John Cuthbert in the 1732. However no procedure was held upon this action, which shows that Castlehill entertained no good idea of his claim, which probably never would have been heard of, had it not been for an *accident* to be immediately noticed, and which, though it did not alter the *nature* of Castlehill's right, or give a better title than he originally had, yet has eventually been the occasion of much litigation, trouble, and expence to the respondents.

After the late Earl's forfeiture, Sir Patrick Dunbar was a very old man, and lived in the remote country of Caithness; his do-
cr,

er, Mr. Ludovick Brodie, was then greatly advanced in years, and as no notification of the survey of these estates, was directed to be made in the publick news papers, the six months allowed to the creditors for entering their claims, expired, before Sir Patrick, or his doer, were apprised of the survey.

The deceased Lady Castlehill, the now defender's cedent, taking advantage of this circumstance, and having patched up a title, upon a general disposition from John Guthbert of Castlehill, her husband, who, as assignee by Plaids to Innes and Clark's back-bonds, stood in the right of reversion, entered a claim upon the estate of Cromarty, for the sums above mentioned, due by the Earl, and which claim was accordingly sustained.

During the dependence of the claim, Sir Patrick entered a caveat, that his right should be preserved entire, notwithstanding of the claim's being entered by Lady Castlehill; for he, being possessed of the writings, necessary for supporting the claim, and having been called on a diligence for that effect, did then assert his right before Lord Woodhall, ordinary, and his Lordship, by his interlocutor, expressly reserved to Sir Patrick, notwithstanding his producing the writings called for, *all right and title, which he had to the subject then claimed by Lady Castlehill.* 1756.

Lady Castlehill acquiesced in this interlocutor, and proceeded to get her claim sustained; and, Sir Patrick was only prevented by death, from commencing an action, which he was advised it was proper in this situation of affairs for him to do, for having it found and declared, by decree of this court, against the said Mrs. Jean Hay, Lady Castlehill, that he had, on the titles aforesaid, the prior and preferable right to the money, with the best and only title to uplift, receive, and discharge the same; and that she should denude of the decree, sustaining the claim in her favour, upon being refunded of the expence debursed, ingetting the claim sustained.

That action, which Sir Patrick himself was prevented from instituting, the respondents brought in 1764, which action came in course before the Lord Gardenston, ordinary, and in which a litigation has been maintained on the part of the defender, which it is happy, but very rarely occurs in this court. Every possible device, that imagination could suggest, has been fallen upon, to protract, delay, and embarrass the cause.

The principal defence insisted upon was, That Sir Patrick, and his predecessors and authors, had been satisfied and paid, by intromissions with Plaid's effects. A condescendence was thereupon exhibited by the respondents, in which, notwithstanding that they were singular factitors, and could not know the intromissions of their authors, or be personally acquainted with transactions, which happened mostly before they were born, they had the candour to acknowledge, that they observed from the writs in process, that Sir Patrick Dunbar had right from Alexander Clark, in the year 1719, to the lands of West Cannisby, the rent whereof amounted to about 300 merks, or thereby; and these were all the intromissions, of which they had the least information.

The above was a full, and the only condescendence, which they could, consistently with truth, exhibit. They could not condescend on, or charge themselves with, or give credit for intromissions, of which they had never heard; and, they had no occasion to know, that the 1271 l. above mentioned, had been recovered by Innes and Clark, from William Innes. This sum was an article in the summons, which Castlhill himself raised in 1732, and, for payment of which, he concluded against William Innes's representatives, after which, the respondents could not have the least reason to suspect, that that sum had been uplifted by Innes and Clark; but, the moment it appeared to have been paid, they admitted, that this sum should be charged against them.

The defender, who affected, that she would prove super-intromissions, was for this purpose allowed diligence after diligence, during a dependence of many months. These diligences were again and again renewed, and the defender examined every mortal, who, she suspected, or pretended, could give her any information, but without effect. At last, memorials were directed to be given in upon the whole cause; the defender would not comply with this appointment without a plea, and it cost several inrolments, before the memorials were forced into process; on which, after the usual procedure, the Lord ordinary, of this date, found, " That the pursuer is intitled to insist, that the defender shall denude in her favour, in so far as the said pursuer shall instruct, that Innes and Clark were creditors to Plaid."

The

The defender, not satisfied with this interlocutor, disputed the respondent's right *in totum*, and presented a reclaiming petition, founding, *inter alia*, on the time above mentioned, limited by the vesting-act, for entering claims on the forfeited estates; and, the respondents knowing their right to be clearly prior and preferable to Lady Castlehill's, who had only the right to the *reversion*, and intitled them to an immediate decret, preferring them to the money; foreseeing too the consequences, which they have since felt, of entering into any unnecessary litigation with the defender, and aware of the game, which they believed would be played, and have since been effectually practised against them, preferred a petition on their part, in which they offered to find the best caution, to account for any *overplus*, that might be found due out of the fund, after clearing the debt to them.

Your Lordships, on advising these petitions, with answers, were pleased to refuse both, and adhere to the Lord ordinary's interlocutor, with this variation however, "That the defender, Mrs. Jean Hay, shall be obliged, before she draw the money in question, to find sufficient caution, for *paying back, and repeating the same* to the pursuer and her husband, or what part thereof they shall be found intitled to, in the event of this process."

On this, the cause having returned to the Lord ordinary, the defender, notwithstanding the full account libelled and produced, with the summons and condescendence already exhibited, insisted, that the respondents should give in another account, of what they called charge and discharge of their predecessor's intromissions; and the respondents, rather than delay the cause, by litigating a matter of little consequence, gave in a second condescendence or account, to which no objections were made by Lady Castlehill; and the whole cause, with the account and vouchers, was thereupon remitted by the Lord ordinary to Ludovick Grant, accountant, to make up a state of the accounts, and to report his opinion upon the objections and answers thereto.

The defender, however, would not acquiesce even in this remit, however harmless, but preferred several representations, on most frivolous grounds, which, either with or without answers, were refused, and the report having been made by the accountant, was approved of by the Lord ordinary.

June 15,
1768.

From

From this report it appeared, that the respondents authors, Innes and Clark, advanced, and paid to, or on account of Plaids, sums now amounting to upwards of 2000*l.* sterling; and the advances made by them, were so clearly proved, by legal vouchers produced, that, however well disposed the defender was, to dispute every inch with the respondents, yet she could not contest a single article of these advances. All she ventured to do, was to stop the report for some time from being approved; after which, she gave in many representations, insisting, That Innes and Clark, and the respondents, fell to be charged with sundry articles, for which credit had not been given Plaids, either in the account, or in the report.

These articles, which were four in number, afforded an ample field of litigation, and, of which, the defender availed herself to the full: and, although the respondents, from the causes before mentioned, defended themselves at an evident disadvantage, against a person, who had lived at the time of the transactions, and having got possession of Plaids's papers, was minutely informed of every particular; yet, as to the first three articles, they were not only totally unsupported upon the part of the defender, but the respondents were lucky enough to disprove them in the clearest manner.

The fourth and last article respected the rents of the lands of West Cannishy, which the defender contended ought to be charged against the petitioner's authors, as having been intromitted with by them from the 1694, downwards; but this plea was over-ruled by repeated interlocutors of the Lord ordinary; and particularly by one, of this date, by which he finds, "That the pursuers
" are only obliged to account for the rents of the lands of Can-
" nishy from Whituesday 1719, in respect the defender offers no
" proof of an earlier possession by Innes and Clark, the original
" trustees, and shows no sufficient cause for resting upon *bare pre-*
" *sumptions* of an earlier possession.

Against these interlocutors, the defender preferred a reclaiming petition, in which she not only insisted with respect to the rents of West Cannishy, but likewise upon the other articles, only one excepted, namely, the 6000*merks* bond, which she had not the assurance to introduce into the petition. And your Lordships, of this date, upon advising the petition and answers, refused the de-
fire

fire of the petition, and adhered to the interlocutors of the Lord ordinary reclaimed against.

It is material here to observe, that by this interlocutor, it was finally adjudged, that no possession or intromission could be made against Innes and Clark, on *presumptions*, but that they were no further liable than for *actual intromissions* proved upon them by positive evidence. And on this fixed principle, the cause having returned to the Lord ordinary, the defender expressly offered, and insisted to be allowed to bring a proof that they had possessed and intromitted with the rents of the lands of Cannisby, from the 1694.

A condescendence was accordingly exhibited of the fact, on which a proof was granted. The Lord ordinary pronounced several interlocutors, finding that the defender had not brought any sufficient evidence to prove or instruct that Innes and Clark had possession of the lands of West Cannisby, prior to the disposition in favour of Sir Patrick Dunbar in 1719.

These interlocutors, the defender brought before your Lordships in a reclaiming petition, which, upon answers, was, of this date, February 1, refused; and your Lordships, at the same time, remitted to the Lord ordinary to grant warrant for inspecting the account-books and papers of the deceased William Campbell late sheriff-clerk of Caithness, who it was alledged had acted as factor for provost Clark; and a diligence for recovering the account-books and other writings of one Alexander Fraser deceased; and as the defender insisted for exhibition of certain papers in the hands of David Lothian, the respondent's agent, it was further remitted to his Lordship to do therein as he should see cause, as well as to hear parties upon what further the defender condescends upon, and offers to prove, relative to the intromissions of Innes and Clark, with the aforesaid rents prior to the 1719. 1770.

Before the defender had applied for exhibition of the papers in Mr. Lothian's hands, he had already got Mr. Lothian examined upon oath, who had deposed that he was not possessed of any papers, which could instruct the possession or intromission of Innes and Clark with the rents of West Cannisby, prior to the 1719. The demand therefore that he should exhibit the papers themselves, after having deposed to their contents, appeared plainly intended for delay, as indeed every step of the proceedings clearly appeared to be; however, the respondents, rather than litigate

any unnecessary point, agreed that Mr. Iothian should exhibit the papers, which he did accordingly; and it appeared on inspection, that they did not in the least tend to instruct any intromission made by Innes and Clark.

The defender was also allowed warrant and diligence for inspection and recovery of clerk Campbell's papers and those of Alexander Fraser. The papers were accordingly inspected, and some letters, accounts, and jottings, were recovered, several witnesses were also examined, and the proof both written and parole, being reported, the Lord ordinary, after memorials were lodged, directed informations; and your Lordships upon advising thereof, of this date, pronounced the following interlocutor: "On report
" of the Lord Gardenston ordinary, and having advised informa-
" tions given in, the Lords find, that the pursuer is accountable
" for the rents of the lands of West Cannisby, for crop 1709, and
" subsequent years."

November 22.
1776.

Against this interlocutor, a petition was preferred on behalf of the defender, in which he prayed your Lordships to find, that the pursuers *were accountable for the rents of the lands of West Cannisby from the the 1694 to the 1709; but this petition your Lordships refused without answers.*

As this was in effect two consecutive interlocutors upon the same point, which therefore by the forms of the court, behoved to be final, the respondents were hopeful that this cause was near ended; but in this they were mistaken, for the defender thought proper to prefer a second reclaiming petition upon pretended *new* evidence, praying your Lordships to find the pursuer accountable for the rents of the foresaid lands of West Cannisby from the 1694.

This petition was appointed to be answered, and answers were accordingly put in thereto; but, before advising, the defender thought proper to apply by petition for a diligence for recovering the steps of procedure, in a process of reduction and improbation at the instance of John Cuthbert of Plaids against the Earl of Cromarty, and the proceedings in a submission betwixt the Earl and Innes and Clark. This diligence having been accordingly granted, and the writings wanted recovered, an additional petition was thereafter exhibited upon the part of the defender, to which
answers

answers were given in ; and the whole having come to be advised, your Lordships, of this date, pronounced the following interlocutor: " The Lords having advised this petition, with the answers, February 28, 1771.
 " together with the additional petition for Alexander Cuthbert, and the answers, *in respect of the new evidence produced*, find the original petition competent, and find the pursuers liable for such of the rents of the lands of Cannisby, due betwixt the years 1694 and 1709, as were payable by the tenants who shall appear to have been in possession at the 1709, and remit to the Lord ordinary to proceed accordingly."

Against this interlocutor, both parties reclaimed. The pursuers in their petition, prayed your Lordships to find that they were not liable for any of the rents of West Cannisby, prior to the 1709. And the defender, on the other hand, contended, that the pursuers fell to be charged with the whole rents of West Cannisby from the year 1694, without distinction, whether the tenants that were in possession in the 1694, remained in the possession in the year 1709, or not ; and your Lordships upon advising these petitions, with answers, of this date, pronounced the following inter- July 19, 1771.
 locutor: " Having advised this petition, (*i. e.* the defender's) with the answers, they *refuse* the same ; and having also advised the petition of Mrs. Elizabeth Dunbar and husband, with the answers, find the pursuers accountable *only* for the rents of the lands of West Cannisby for crop 1709, and subsequent years, unless the defender shall instruct that the pursuers intromitted with the said rents, prior to crop 1709 ; and remit to the Lord ordinary to proceed accordingly, and further to do as he shall see cause."

The defender has reclaimed against this interlocutor, and the petition having been ordained to be seen and answered, these answers, in obedience thereto, are humbly submitted on behalf of the respondent.

The petition now to be answered, is in effect the *fourth* petition that has been preferred on the part of the defenders, upon the same point. And the respondents cannot but consider it as somewhat extraordinary, that your Lordships should have the trouble of this petition, when you have already given *two* consecutive judgments against the defender, upon the *same evidence*, upon which the question is *again* submitted to your Lordships review by this

this petition. Your Lordships upon advising long and elaborate informations, pronounced an interlocutor of the 14th November last, finding the respondent *only accountable for the rents of West Canisby, for crop 1709, and subsequent crops*, when all the accounts and settings recovered out of clerk Campbell's repositories, were under the view of the court; and upon the 18th of December thereafter, a reclaiming petition against this interlocutor, praying to find the petitioners *liable for the rents from the 1694 to the 1709*, was refused without answers; so that here were two consecutive interlocutors upon the same point, which therefore, by the established forms of the court, became final, as the evidence then stood.

The petitioner, sensible of this, preferred a second petition; and in order to render the same competent, he founded upon what he called *new documents*, lately discovered; and your Lordships, upon advising this petition, with the answers, made to far a variation of the former judgments, as to find the now respondents *liable for such of the rents of the lands of West Canisby due betwixt the 1694 and 1709, as were payable by the tenants who should appear to have been in possession at the 1709*; and your Lordships, upon advising mutual petitions and answers, having returned to the interlocutors formerly pronounced upon 29th November and 18th December 1770, it is remarkable that the petitioner, in reclaiming against this *last* judgment, does not so much as pretend to found upon what he formerly called his *new evidence*, and which alone rendered his second reclaiming petition competent, but rests his cause entirely upon the evidence which was before the court, when the foresaid two consecutive judgments of the 29th November and 18th December 1770, were pronounced.

It is therefore humbly submitted to your Lordships, if the petition now under consideration, is at all competent. Your Lordships found the second reclaiming petition competent, because writings had been produced and founded upon, which formerly had not so much as been mentioned; but when, in this fourth reclaiming petition, the petitioner entirely gives up his new evidence as nothing to the purpose, and rests his cause upon the evidence that was before the court, when the interlocutors of the 29th November and 18th December last, were pronounced, it, with submission, occurs to the respondents, that such a petition is inconsistent with the
stated

stated regulations of the court; for as it is not *new arguments* that will render a reclaiming petition competent, so it is calling upon your Lordships, to review what has been established by two consecutive judgments, upon the precise same evidence upon which these judgments were pronounced.

The petition now to be answered, is *confused* to the evidence arising from the accounts and jottings, recovered out of clerk Campbell's repositories, which have already been, upon the part of the petitioner, the subject of no less than one elaborate information, and three elaborate reclaiming petitions, drawn by different council; and who no doubt had all the assistance the petitioner himself could give them, who during the whole of the period, was in Scotland, attending this cause, and who indeed has been singularly attentive to it. And as in so many different papers, drawn by so many different lawyers, and with so much attention, it is not at all probable that any thing *material* would be omitted, so any new observations in the present petition, and which are said to be the production of the petitioner himself, will, in the respondent's humble apprehension, when duly examined, appear to your Lordships to be of no earthly significancy.

The prayer of the petition, now to be answered, contains three alternatives, 1mo, To find the now respondents liable to account for the whole rents from the year 1694, in respect the petitioners (it is said) have instructed the intromission of the trustees previous to the 1709; at any rate, 2do, to find them liable to account for the rents mentioned in clerk Campbell's accounts, which are said to be more than sufficient to pay the rents of the years mentioned in those accounts, and must therefore have been levied on account of bygones previous to the 1709: Or, at least, 3tio, to find that the no wrespondents, are liable to account for the rents prestable by the tenants, who appear to have been in the possession in the year 1694, and to have remained so in the 1709.

The last of these alternatives, is the only one, if any, that is at all competent to be now reviewed by your Lordships; and, indeed, the petitioner himself seems to entertain this idea of the matter, although, in his former petition, he, in effect, gave up that point, and was forced to admit, ' That it did not appear who were the " tenants in the lands of Canisby, when Innes and Clark got " their right from Plaids; so that it could not be known, whether
E " the

" the tenants, that possessed at the time of their entry, were the same that possessed in the year 1694."

Your Lordships will observe, that the petitioner, in the first place, founds Innes and Clark's intromissions, *retro* to the 1694, upon an hypothesis, which he is pleased to assume, that the rents from that period behoved to be *in melius*, unuplifted at the date of Innes and Clark's right in the 1709, because, till then, it is alledged, there was no person, who had any *title* to uplift them. He says, That it is impossible to believe, that Sir William Sinclair of Mey, the former proprietor of the estate, would be allowed to intromit, after the judicial sale in the 1694; that they could not be levied, in consequence of Mackenzie of Prestonhall's declarator of ward and non-entry, as the same was never brought to a conclusion; and that it is equally clear, that neither Plaids himself, no any in his right, were in a situation to uplift those rents, for that the interpellation given to the tenants, by the citation in Prestonhall's declarator, was sufficient to prevent the tenants from paying to Plaids.

But, in the first place, allowing it was true, that *no person was in title* to uplift till the 1709, yet that would not be sufficient to conclude the respondents. It is impossible for the respondents to prove, that Innes and Clark did *not* intromit prior to the 1709, that is a negative, which proves itself; the *onus probandi* therefore does clearly lie upon the petitioner. The rents in question, had become due, *prior* to the right granted by Plaids, in favour of Innes and Clark; and, therefore, it is incumbent upon the petitioner, not only to instruct, that so many years rents were *then* relling by the tenants, and in their hands, but also to prove, by clear and positive evidence, that *these* rents were *actually* uplifted and intromitted with by Innes and Clark.

By the back-bonds granted by Innes and Clark to Plaids, and by which they were to be accountable, it is exprestly declared, that they are not to be made lable for omissions, but for *their actual intromissions only*; and, therefore, it is not even sufficient to shew, that Innes and Clark might have intromitted (was that to be supposed in the present question) but it must be proved by positive evidence, that they *actually* did intromit. They are not to be concluded by presumptions and conjectures, in opposition to the highest probability, that the rents would be allowed to remain
in

in the tenants' hands, from the 1694, to the 1709; and, indeed, it is established, by the interlocutor of the Lord ordinary, of the 14th of July 1768, and so far affirmed by your Lordships, that intromission was not in this case, to be established against Innes and Clark, upon *bare presumptions*. It is a thing notorious, that the bulk of the tenantry in Scotland, were, during this very period, in a bankrupt situation: and, therefore, it is not only incredible, that rents should be allowed to remain in the hands of tenants, for the space of 16 years, without any person enquiring after them; but, it is still more incredible, that, if such a thing had happened, that these 16 years rents, which was then equal to the value of the lands themselves, could be recovered from the tenants.

Upon the supposition, that no other person was *in titulo* to uplift, or had been applying to the tenants for the rents, it is not at all an improbable case, that Sir William Sinclair, the former proprietor of the estate, might have obtained payment from the tenants; at least, this is a much more credible supposition, than the hypothesis, which the petitioner has been obliged to adopt in this case. Indeed, any thing will be presumed, rather than that the rents remained unuplifted, during the long period between the 1694 and the 1709, a supposition extravagant in itself, and which rebels against all credibility.

2do, There is no occasion to have recourse to the supposition; of Sir William Sinclair's uplifting the rents. It is set forth in the petition, that a process of declarator was brought at the instance of Mr. Roderick Mackenzie of Prestonhall, as donor of the ward of Cuthbert of Plaids, which process contained a personal conclusion against the tenants, for payment of their rents to the pursuer. It is not true, what is alledged in the petition, that this process of declarator did not come to a conclusion; on the contrary, of this date, decret was pronounced in terms of June 16, 1699. the libel, finding and declaring, that the lands libelled, lying in the shire of Caithness, wherein the said deceased Alexander Cuthbert died last vest and seised, fell, and became in his Majesty's hands, by reason of ward, by decease of the said Alexander Cuthbert, who died in the month of 1681, and minority of John Cuthbert, his apparent heir; and that the whole mails and duties of the said lands, since the said year 1681, together

ther with the relief, when the same should happen, did belong to the pursuer, as donator foresaid; and also finding, *quoad* the lands lying within the shire of Ross, that the foresaid gift of the ward-duties, and relief, was for the behoof of the said Mr. Roderick Mackenzie, pursuer, in so far as extended to the expences of obtaining and declaring the gift, and to the sum of 2000 merks, and bygone annualities of the same, from the date of the decret of sale; and, therefore, decerning the tenants and possessors therein named, of the whole foresaid lands and estate, lying within the shires of Ross and Caithness, to make payment and deliverance to the pursuer, of the several quantities of victual, and sums of money libell'd, as the yearly rent of the said ward-lands; and the said Cuthbert, and his tutors and curators, if he any had, for their interest, as having intromitted therewith, and that for the crops and years above specified, and yearly and termly in time coming, during their possessions, *and the said Cuthbert, his minority.*

From the premises, it is obvious, that Prestonhall had a title to uplift, and had obtained a personal decerniture against the tenants in the year 1699; and, therefore, it is much more presumable, that Prestonhall did actually uplift these rents, till Plaids's majority in the 1702, than that they remained all along in the tenants hands, for the space of 16 years, and were recovered by Innes and Clark, in consequence of their right from Plaids, in the year 1710.

And, 3^{io}, Plaids had a clear right to uplift the rents himself, and the petitioner has assigned no reason, to satisfy any man living, that Plaids did not actually uplift these rents. He was then confessedly in straitned circumstances, and, when he had a title to possess these lands, it will not be presumed, that he would neglect to do so, and suffer the rents to remain in the tenants hands. He certainly had as good a title to possess, betwixt his majority, and the date of his disposition to Innes and Clark in 1709, as Innes and Clark had to possess upon that disposition, after the 1709; and, the petitioner has not been able to assign any good reason, why Plaids should have allowed the rents to remain in the tenants hands, when his circumstances required his uplifting them, and when he had a title so to do.

And

And, as to what is said, That the citation in Prestonhall's declaration, was sufficient to prevent the tenants from paying to Plaids, it is, with submission, a strange fancy in this petitioner to suppose, that Prestonhall would neither uplift himself, nor allow Plaids to uplift. 2do, Your Lordships will observe, from the tenor of the decree, above recited, that it went no farther, than the rents of the lands during the minority of Plaids, which expired in 1702, and was no interpellation to the tenants from paying their rents to him, from and after the 1702.

Indeed, it is obvious, that Plaids had precisely the same right to uplift the rents prior to the 1709, that Innes and Clark had after the 1709; and, as it does not appear, that Innes and Clark met with any obstruction from any person whatever, in uplifting the rents, or were obliged to take any judicial step against the tenants, in order to compel payment; so, there is not the least reason to presume, that Plaids himself was not in the full possession and enjoyment of the rents of West Canisby, until he assigned the same to Innes and Clark, in the 1709.

The petitioner says, that Plaids himself had not the *jus exigendi* of these rents, for that in the decret of division the interest of provost Cuthbert, was not set off to any particular person, but in general to the *representatives* of provost Cuthbert.

In the first place, the respondents are advised, that the decret of division's being pronounced in favours of the *representatives* of provost Cuthbert, would have precisely the same effect, as if it had been pronounced in favour of John Cuthbert *nominatim*. A service in such case, is not necessary to establish a right, but the person who could subsume and say, that he was provost's Cuthbert's representative, would be entitled to the exercise of the right; and it was a thing notorious, that Plaids was provost Cuthbert's representative. And, 2do, supposing that the right fell to be considered as *in hereditate jacente* of provost Cuthbert, and that a service to him was necessary to vest the right itself in the person of Plaids; yet it is an established point, that tenants are not only in safety to pay their rents to the apparent heir, but he can, in virtue of his apparenacy, even compel the tenants to pay, if they should be refractory; and as it is not disputed, that John Cuthbert was the person who had a right to make up titles to provost Cuthbert's subjects; so it is impossible to doubt, that if he had met with ob-

direction in levying the rents, on account of his want of title, he would have made up a legal title in his person, in order to entitle him to receive the rents. It is impossible for any mortal to believe, that rents would have been allowed to remain in the hands of tenants, for the space of sixteen years, merely on account of the defect of title, when Plaid's had it in his power, whenever he pleased, to remove the objection, at a trifling expence.

The petitioner says, that the decret of division, was not extracted till February 1710, and till that was done, no person could compel the tenants to pay their rents.

But this observation, when examined, will appear to be very inconclusive. It proceeds upon the supposal, that the extract produced by the petitioner, was the *only* extract that was taken of the decret of division 1696, and also, that without an extract of *that* decret, no rents could be recovered; and that therefore the rents must have remained in the tenants hands.

But, in the first place, it has been already shown, that there was a title in the person of Prestonhall to recover the rents prior to Plaid's majority. And, 2do, supposing the extract in process to have been the only extract taken out, how does this prove that the rents of the lands of West Cannilby, remained in the tenants hands from 1694 to 1709? The decret of division, gave not only a title to the lands of West Cannilby, but also to the whole estate of Mey, not purchased at the roup: and if it shall be supposed, that no person had a title till 7th February 1710, when the extract in process appears to have been taken out, then it must follow, that Lord Cromarty, who by this decret, had the greatest part of the estate in Caithness allotted to him, allowed the rents to remain in the tenants hands from 1694, to the time when this extract was taken out. This is the natural consequence of the petitioner's observation; for otherways, if it shall be supposed that *another extract* was previously taken out, *that* extract, by whomever taken, gave an *equal* title to the rents to all concerned in the division; and as it does not appear that any compulsion was ever used against the tenants, for payment of their rents, posterior to the 1709, it therefore cannot be presumed that any would be necessarily preceding it.

Besides,

Besides, it appears from the disposition before mentioned, in January 1710, that Innes and Clark were specially assigned to the decret of division; and this disposition bears, that the writings relative to the *baill premisses*, were delivered to them, conform to inventory, which must have included an extract of that decret, and shows that the extract in process was not the only extract that was taken out. It likewise appears from the decret of modification and locality, at the minister's instance, in June 1708, that Plaids was known to be both proprietor and in possession of West Cannisby, as he is called as a defender in that process, under the title of *portioner of Cannisby*.

The petitioner founds likewise upon the proceedings in the submission with the Earl of Cromarty, wherein it is said, that Innes and Clark, in the answers to the Earl's counter-claim for the ward-duties, asserted that John Cuthbert of Plaids, had no possession of Mey's estate in Caithness, from which the petitioner would infer, that Plaids did not intromit with the rents of the lands of West Cannisby, prior to the 1709.

This matter was fully explained in the now respondents last reclaiming petition, of date March 9th 1771, fol. 19, &c. and which the respondents will not now trouble your Lordships with resuming. It from thence appears, that the passage referred to, does not, in the smallest degree, relate to John Cuthbert of Plaids's possession of the lands of West Cannisby, in his own right, upon the decret of division, prior to the 1709; but that the foresaid passage, was only a repetition of the *defences* pled by Plaids and his curators, in the foresaid process of declarator that was brought against him at the instance of Prestonhall; and, at any rate, it is plain, that any thing that was there said, neither did nor could apply to Plaids's possession after his majority in 1702.

The petitioner says, that Clark himself went to the county of Caithness, after he had got a compleat right to the rents, and which, as appears from his letter of April 1711, must have been before that period; that when he went there, it cannot be doubted that at this period, he would institute an account with the tenants, with regard to their rents, and would levy from them first the crop 1709, and whatever else he could get, he would apply to the bygoners, and that what bygoners he could not recover, he would leave with his factor, in order to be recovered by him; and that the factor

factor would fall to apply whatever he should receive from the tenants, in the first place, to the extinction of the rents of the 1710, and subsequent years, which it was his own business to levy; and if there was any over-payments made, more than sufficient for that purpose, these still be applied in extinction of the old rents or balances, still outstanding, upon the clearance betwixt the tenants and provost Clark himself.

The petitioner, by adopting this hypothesis, has established a distinction betwixt the rents 1710, and subsequent years, that fell under clerk Campbell's factory, and the arrears that are supposed to have remained due for the years prior to the 1709; and therefore he concludes, that the words, *all rents*, that occur in the paper of clearances with the tenants, by clerk Campbell, must apply to the supposed arrears due preceeding the 1709, and which he therefore holds as evidence, that rents prior to the 1709, remained in the hands of the tenants, at the commencement of Innes and Clark's right.

But the whole of the petitioner's hypothesis, is totally unsupported by evidence, and is perfectly inconsistent both with reason and the uniform practice of every man versant in these matters. There is no evidence that ever provost Clark was in Caithness. The letter referred to, does by no means prove it. At the same time, it is a circumstance of no earthly moment whether he was or not; for supposing he was there, and supposing that the rents preceeding the 1709 were outstanding, it is perfectly absurd to suppose that he would first apply the money he had received, in payment of the rent 1709, and then open a new account with them as to the rents preceeding that period. It is impossible to assign any good reason for following this method. On the contrary, if the tenants were really owing rent for years prior to 1709, he would naturally apply the whole money he received, in payment of the oldest arrears, as far as they would go. If, for example, the rents 1707 and 1708, were likewise owing, it is impossible to assign a reason why provost Clark should discharge the rents 1709, leaving the rents 1707 and 1708 unpaid. He would certainly, in the first place, apply the money he received, in payment of the rents 1707, and discharge the same accordingly, and thereafter he would apply the payment, to the rents 1708, before he would discharge the rents 1709. This is the course which every man of business, or of the least degree of understanding, would naturally follow, and

no reason can possibly be assigned, why provost Clark should have followed another course; nor can it be presumed, without evidence, that he did so: He, nor no man of common understanding, could ever think of taking payment of the rents 1709, leaving the rent 1708, &c. outstanding.

In like manner, when clerk Campbell, the factor, undertook the management, as his factory would certainly give him a right to uplift the whole rents that remained unpaid, (and which indeed the petitioner himself supposes) he would certainly follow the same course. He certainly would take regular payment of the rents, and never would think of taking payment of the crop 1710, if the rent of former years was owing.

The respondents are truly at a loss to understand what the petitioner means, in saying, that what clerk Campbell received, behoved, in the first place, to be applied in extinction of the rents of 1710, and subsequent years, *which it was his own business to levy*. If there were arrears due preceeding the 1710, it was as much *his business* to levy these, as the rents 1710; and it is impossible to believe, that he, or any man of common understanding, could ever think of taking payment of the rents 1710, and leave the rents 1708, or of any preceeding crop, unpaid; so that the whole of the petitioner's hypothesis, for establishing a distinction betwixt, what is called old rests, and the rents of 1710, and subsequent crops, upon which so great stress is laid in the petition, as it is totally unsupported by evidence, so it cannot be adopted, as being absurd in itself, and contrary to what is done in any such case.

It was shown to demonstration, in the now respondents last reclaiming petition, and indeed it appears from the examination of clerk Campbell's accounts themselves, that *old rests* and *bygones* were understood to be synonymous terms. And indeed what must destroy at once the petitioner's hypothesis, is an account debit and credit, betwixt clerk Campbell and provost Clark, in which account, Campbell debits himself with the rents of West Cannisby for the years 1712, 1713, 1714, &c. and takes credit for 299 l. 5 s. 5 d. of "cash paid to provost Clark, as per his several letters acknowledging the same," and which sum, exactly corresponds with the sums mentioned to have been received in the provost's letters.—Clerk

Appendix,
p. 4.

Campbell

(23)

Campbell in this account, likewise takes credit for the following article :

	B.	F.	P.	Money.
By rests of rents due by the tenants per particular account	99	0	0	L. 75 10 0

The above article of rests exactly tallies with the amount of the balances arising due by the tenants, as stated in the fore said account or paper of clearances, thus :

	B.	F.	P.	Money.
Peter Swannie	15	0	0	L. 18 8 0
Donald Williamson	29	1	0	22 2 0
Thomas Dunnet	17	3	2	22 2 0
Matthew Dunnet's relict	19	1	2	0 0 0
George Mowat	17	2	0	12 18 2
	<hr/>	<hr/>	<hr/>	<hr/>
	B. 99	0	0	L. 75 10 2

This is demonstration, not only of the construction put by the respondents upon what is called *old rests*, but also that *these* rests did, and could only apply to the year 1712, and subsequent years, for the rents of which, clerk Campbell charges himself in the fore said account, and at once puts an end to the forced conjectures and strained inferences, with which the petitioner has hitherto attempted to mislead the court; for as clerk Campbell, in the said account, does not charge himself with rests of any kind, but only with the rents of the lands for the years 1712, 1713, 1714, 1715 and 1716; to the rests for which he takes credit, cannot possibly apply to any other years than the years contained in the charge.

The petitioner says, that the old rests or by-gones, cannot apply to the years 1710, 1711, 1712, 1713, and 1714, because the rests of *these* years, are expressly mentioned as paid, and are set in opposition to the old rests still remaining; and that they cannot apply to the years 1715 and 1716, because the accounts do likewise make mention of the old rests or by-gones, as contradistinguished to the years 1715 and 1716, and which two years are always mentioned as being due in whole or in part.

But this observation, is founded upon a mistake; the first jor-
ting

ting or memorandum, in the paper of clearances, wherein old rents are mentioned, is that respecting Donald Williamson, (appendix, p. 6th) which is in the following words: "Donald Williamson labours three fadin (*i. e.* farthing) for Martinmas 1712, 1713, 1714, 1715, and 1716, and pays 11l. 1s. money, and nine bolls victual. He *only rests* Martinmas debt 1715, and thirteen bolls old rests, and the farm 1715 and 1716, allowing what he paid to the minister."

There is nothing in this memorandum, which says, that Donald Williamson had paid *all* his rents preceeding 1715, and that he *still* owed thirteen bolls of *old arrears*, which last expression, in common language, does clearly apply to the victual-rent of the year 1714, and the preceeding years, mentioned in the memorandum; and, accordingly, in the account of what this tenant owed, as subjoined to the foresaid memorandum, the thirteen bolls of old rests, are first stated, and then follows the victual rent of the years 1715 and 1716, exactly agreeable to the memorandum.

The jottings or memorandums, respecting the next two tenants, to whom *old rests* are stated, are precisely in the same terms; and as Matthew Dunnet's relict, the last of these tenants, is confessedly none of the tenants who are said to have possessed in 1694, as neither her's nor her husband's name appear among them, it is a further demonstration, not only that the expression, *old rests* or *by-gones*, did not apply to rents betwixt 1694 and 1709; but also that these jottings or memorandums, could not mean that the rents 1714, and preceding years, back to the 1709, were paid, and that arrears preceeding the 1709, were resting by her, when she was not a tenant, during that period.

The petitioner says, that the 13 bolls of old rests, stated in the jotting or memorandum respecting Donald Williamson, must have related to rents due prior to the 1709, because as thirteen bolls, were four bolls more, than one year's rent, so if it had related to the years mentioned in the memorandum, it would have run that he was due the victual rent 1714, 1715, and 1716, and four bolls of arrears.

But this observation, proceeds from not attending to the difference betwixt the payment of victual rent and money rent. In the case of a money rent, it would be absurd to suppose, as the respondents

respondents have already noticed, that payments would be applied to subsequent years, when part of prior years was outstanding. A payment of money rent, though made in the 1716, would be applied to the arrears of preceeding years, before it was applied to any part of the rent 1716; but the case of victual rent is very different. It might be doing great injustice to one of the parties, to apply the victual delivered in a subsequent year, in payment of the arrears of preceeding years; because, according as the price of victual varies, the victual of *that* year, may be either more or less valuable, than the victual of the year for which the arrear is resting: and therefore the payments of victual, fall to be stated to account of the victual rent respectively, of the years in which the victual was delivered; and therefore there is nothing absurd in supposing, that Donald Williamson, for the year 1712, had delivered five bolls short of his victual rent; that he had delivered four bolls short in the year 1713, and the like number in the year 1714; and if that was the case, it would not have been agreeable to truth, to have stated that Donald Williamson, was due the victual rent 1714, 1715, and 1716, and four bolls of arrears, but it would have been perfectly agreeable to the fact, as was done with respect to him, to have stated that he rested the whole victual rent 1715 and 1716, and thirteen bolls of arrears.

It is said in the petition, that it appears from an abstract subjoined to the petition, of accounts with *four* of the tenants, that charging them, respectively, with the rents payable by each of them, for the years 1710, 1711, 1712, 1713, and 1714, and discharging them with the alledged payments made by them respectively, these payments, do considerably exceed the *quantum* of the rents payable for the said five years, for which alone they visibly obtain a discharge; and from thence, this conclusion is drawn, that if, upon comparing the rent actually due, with the victual actually paid, during these years, it shall appear that these years rents, are considerably overpaid, it destroys the idea of the old rests, mentioned in the paper of clearances with the tenants, being in any degree relative to balances arising from the year 1710, and subsequent years, and that these over payments, must necessarily suppose, that these old rests, arose from the arrears of former years, and, consequently, that the now respondents authors, had intermissions with the rents previous to the 1709; that the overpay-
ments

ments appearing upon the face of the accounts in the foresaid abstract, do necessarily carry the payments of the tenants considerably back into the years preceeding the 1709; and that therefore the petitioners, must be subjected, if not to the whole rents from the 1694, at least for these overpayments: And in order to pave the way for this conclusion, the petitioner is obliged to suppose, without the least evidence, that provost Clark did himself, not only intermit with, and levy from the tenants, the rent of the year 1709, but also what of the by-gones he possibly could.

But the respondents are persuaded, that when the accounts stated in the abstract subjoined to the petition, are duly examined and considered, your Lordships will be of opinion that the petitioner cannot from thence, draw any solid conclusion.

These accounts respect the following four tenants, viz. Peter Swannie, Donald Williamson, Thomas Dunnet, and Matthew Dunnet; and your Lordships will particularly observe from them, that the overpayments, supposed to be made by the two *last* of these tenants, are within a trifle the *same* with the overpayments, supposed to be made by the two *first* of these tenants. The overpayments by Swannie, are twenty-three bolls, three firlots, and two pecks; those by Williamson, twenty bolls three firlots three pecks; those by Thomas Dunnet, twenty-two bolls two firlots; and those by Matthew Dunnet, twenty bolls one firlot.

Now your Lordships will be informed, that neither Thomas nor Matthew Dunned were tenants in the 1694. The plea hitherto maintained by the petitioner is, that the respondents must be liable for the rents due by *such* as were tenants in the 1694, because, as the rents from the 1694, must have been resting in the 1709, (there being no person *in titulo* to uplift them) and as these tenants were not removed, the presumption is, that the trustees would uplift the whole bygone rents due by them; so by the same rule, the two Dunned, cannot be presumed to have possessed sooner than the 1709, when Innes and Clark's right commenced; and therefore the supposed overpayments by them of 22 bolls two firlots, and twenty bolls one firlot, can never arise from the arrears of rents preceeding the 1709, during which time they did not possess: And indeed if it should be supposed, that these two tenants, entered to possess, *earlier* than the 1709, it would put an end to the allegation, upon which the petitioner founds his capital argu-

ment, viz. that no person did, nor could intromit, with the rents, betwixt the 1694 and 1709, because the very hypothesis that these two tenants, who were not in possession in the 1694, were put in possession prior to the 1709, must demonstrate that *some* person was in the possession of the lands during that period. What has been said, must therefore destroy the credit of the foresaid abstract, and clearly shew that the accounts therein stated, are absolutely erroneous.

Another observation, equally conclusive, arising from the face of these accounts stated in the abstract, respects Peter Swannie, the first of the tenants therein mentioned, and who, the petitioner says, was one of the tenants before the 1709. In the clearance with him, mentioned in clerk Campbell's jottings, no *old rents* or *by-gones*, are charged, which shews that *none* were due by him; and if the petitioner's supposition were true, that provost Clark had himself cleared with Swannie, and the other tenants, for the year 1709, and proceedings, it cannot be supposed that Swannie would be afterwards making payments to clerk Campbell, to account of the rents that had been cleared with, and paid to, provost Clark; and therefore the account of the supposed payments by Swannie to clerk Campbell of the rents 1710, and four subsequent years stated in the foresaid abstract, must certainly be erroneous, in so far as it makes an *overpayment* for these five years; and it most clearly demonstrates, that the articles stated in these accounts, must relate to *other* things as well as payment of rents. And indeed that this is the case, will further appear from an examination of the particulars; and as the articles of Swannie's account, which are eleven in number, are the same with the other three accounts contained in the abstract, an examination of the particulars of his account, will be sufficient to give your Lordships an idea of the whole.

Art. 1. The first article is 7 bolls 2 firbts, as the victual-rent, crop 1710, said to have been delivered to Campbell, and the delivery said to be proven by provost Clark's letters of May and September 1711 (appendix, p. 110) although this payment, with others, is said to have been torn out of what the petitioner calls Campbell's blotter.

But these letters do not shew, that Campbell had *then* received the *whole* of the victual-rent, crop 1710, from the tenants, or that the whole of that year's victual-rent was paid at once. There

is nothing in the letters to that purpose; as Campbell's intromissions commenced with crop 1710, it is much more reasonable to suppose, that the first payment, without a date, marked in the blotter, of six bolls (which is article 5th of Swannie's account in the abstract) was to account of the rent, crop 1710, than that the *whole* of that year's rent, was paid at once, or that these six bolls, is applicable to any other year. Besides, where is the evidence, that these six bolls were a payment to account of any *other* year? on the contrary, it being the *first* payment stated in the blotter, must be presumed to be to account of the rent 1710.

It is indeed said, that jottings of some payments have been torn out of the blotter; but, this is a mere supposition, unsupported by any evidence. What is called the blotter, is a small duodecimo paper-book, of the size of an almanack, wherein several jottings, in different hand-writing, respecting sundry things, are made without any order or connexion; and, as none of the leaves of this book are numbered, it is impossible to say, that it contained any more; or even if this should be supposed, where is the evidence, that these leaves contained jottings of *other* payments of these rents? To suppose that they did, would be to fix an intromission against Innes and Clark, upon a mere conjecture, totally unsupported by evidence.

The next article is 6 bolls 3 firlots 2 pecks, delivered to the minister of Canisby, *per* receipt, June 1716. Art. 2.

But, it is inconceivable, how this payment in June 1716, can be applied in payment of the rents for 1714, and preceedings.

The next article is 7 bolls 2 firlots shipt, of crop 1714, per No. Art. 3. 17.

This article, is equal to a year's victual-rent, and is only instructed by an unsigned account, not holograph of Campbell or his son, and intituled on the back, *Double account of Provost Clark's tenants of crop 1714*, which is surely not legal evidence of a payment to Campbell of that year's rent.

Article 4th is 7 bolls, said to be delivered to Bowermadden by Swannie: and this payment is said to be instructed by a letter (No. 23 of Appendix) from one George Mouat to clerk Campbell, dated 31st October 1715. Art. 4.

But,

But, this letter, under the hand of a stranger, can be no evidence of any intromission, as it is not explained on what account, the victual here said to be paid by the tenants to Bowermadden, was made.

Art. 6.

The 6th article is no less than 9 bolls, said to have been paid to Campbell in July 1712, *per* his blotter, but which was, it is said, omitted in printing the appendix.

This jotting, from which this article is taken, is on the second page of the first leaf of the blotter, which stands thus:

" July 1712.

" From Pet Swany, - - 9 0 00

" From Thomas Dunnet, - 9 0 00

" This is single lib. for which they have to allow two pecks
" for each boll, for making malt."

This jotting, was omitted to be printed in the appendix, probably because it was unintelligible; and, indeed, it is impossible to say, what is meant by it, whether the figures denote victual or money, or what else; nor does it bear, to be anyways connected with the rents due by these tenants, nor mentions to be to account thereof, nor for what years.

Art. 7.

Article 7th is one boll, said to be received 15th August buno year is mentioned, and, therefore, not easy to conceive, as a payment made to account of 1714, or precedings.

Art. 8.

Article 8th is in these words: " Ditto, paid to ditto July and August 1712, *per idem*, 10 bolls."—The petitioner seems to be satisfied, that this article is the same with the two preceding articles; and, therefore, he says, to prevent dispute, it shall not be stated: But that is not enough, it proves, according to the petitioner's own admission, that this blotter contains *double* entries of the same thing, which is sufficient to destroy its credit altogether, and to render it unavailable, for constituting a charge against any person whatever.

Art. 9.

As to article 9th, the deduction of one boll, one firiot for malt making, is not said in the blotter to be made out of rent, but out of the victual then received, and, consequently, cannot be said to be a payment of the rent.

Art. 10.

Article 10th, being 8 bolls 3 firlots, said to be received by Campbell *from* Swannie in malt, appears on the contrary from the blotter, to have been delivered by Campbell *to* Swannie, in order,

as

as is supposed, to be malted; and that this must have been so, is farther evident from this circumstance, that these 8 bolls 3 firlots, is the precise balance of the 10 bolls victual, mentioned in article 8th, to be received in July and August 1712, after deduction of the 1 boll 1 firlot, mentioned in article 9th, for making it into malt; and these articles, 8th, 9th, and 10th, do accordingly follow one another on the same leaf of the blotter. This shows, how erroneous the petitioner's accounts, from which he makes the over-payments arise, truly is, when he charges as an article of payment of rent made to Campbell, what was truly a delivery of victual by Campbell to Swannie, in order to be malted by him for Campbell's behoof.

Article 11, is 6 bolls 2 firlots, said to be delivered to skipper Mackenzie's ship. This article is not in the blotter or count-book, but on a loose slip of paper, unsigned, and without a date, and not holograph either of Campbell or his son. This jotting, may respect the victual delivered the tenants to malt, and given by them into the ship, as it is known to be customary to dry or malt the bear before sending it off; or, as the article is without a date, it may, for ought that appears, be part of the victual said to be shipped, of crop 1714, by Swannie, mentioned in article III. Besides, in the jotting respecting the present article, the victual is not said to be delivered, but *pawn'd* to skipper Mackenzie's ship; so that no stress whatever can be laid upon it, for instructing a payment of rent to Campbell.

The aforesaid observations, do all apply to the particulars of the accounts made up in the abstract, relative to the other three tenants: And it must from thence appear evident to your Lordships, that they are most erroneous, at least in sundry particulars, and which must therefore be sufficient to destroy the credit of them altogether, and that they are by no means sufficient to support a charge against any person whatever: And as these pretended payments, do not bear the smallest relation to rents, due preceeding the 1709, nor the least mention made in clerk Campbell's accounts and jottings, of any intromission had by him, of rents due preceeding the 1709, so the petitioner is forced to admit, that it is only in support of the observations in his former papers, founded upon the expression of *old rests* or *by-gones*, mentioned in Campbell's papers of clearances, that these accounts, of alledged payments, are now made up, and introduced;

roduced ; but as it appears that the accounts are most erroneous, and that no stress can be laid upon them, the petitioners cannot stand just where it did ; and it has been already shown, that the expression of *old rents*, or *by-gones*, in clerk Campbell's accounts, do not appear in the least to apply to any *other*, than the rents of the years particularly mentioned in them. This is the natural idea that presents itself, upon reading Campbell's accounts and jottings themselves ; and it is confirmed, in the strongest manner, by other collateral evidence, and the observations which have been already made. It has been already shown, that the expression of *old rents*, obtains in the accounts, with those who were *not* tenants prior to the 1709, and who, consequently, could not be owing rents incurred before that period. It has been likewise shown, that even with respect to Peter Swannie, one of the tenants, who is said to have been in possession prior to the 1709, that although no old rents or by-gones are charged in Campbell's accounts to him, yet that *similar* articles of payment, are stated in the account in the abstract, subjoined to the petition, with respect to him, as are stated to the other tenants before the 1709, to whom old rents are charged, which demonstrates, that these supposed payments do not apply to rents *prior* to the 1709, and that the petitioner is altogether in a mistake concerning them, and, consequently, that clerk Campbell had no intromission with rents incurred preceeding the 1709. To all which may be added, that the *balances* due by the tenants, upon the clearance with clerk Campbell, including the old rents, were taken credit for by him, in the account, charge and discharge, of his intromissions, before mentioned, wherein no charge whatever is made against Campbell, for rents prior to 1709, which shows to demonstration, that these old rents, could not arise from arrears due before the 1709, because, if they had, Campbell could not have taken credit for them, out of the rents incurred *after* the 1709.

The petitioner says, that it was incumbent upon Innes and Clark to have kept accounts of their intromissions, and as this has not been done, every thing is to be presumed against them, and the respondents must therefore be subjected for the rents *retro* to the 1694, unless in so far as they shall be able to bring satisfactory evidence, that Innes and Clark were not in a situation to recover those rents.

But,

But, with submission, this is a most extraordinary doctrine, and, if it was to take place, it would be equally good for subjecting the respondents to any other demand the petitioner shall be pleased to make. For ought that the respondents know, Innes and Clark might have regularly given in accounts of their intromissions to Plaids, and, from the necessitous circumstances he appears to have been in, it is highly probable that this was the case: But as the respondents are singular successors, and are not possessed of the papers of Innes and Clark, or of Plaids, it cannot be expected that they can know any thing with certainty about the matter. The keeping and preserving an account of their intromissions, was not a condition imposed upon Innes and Clark by their backbonds, nor was there any forfeiture or penalty stipulated, in case of their neglecting to do so; on the contrary, it is thereby declared, that they were not to be liable *for omissions*, and they could only account for their intromissions, when called upon for that purpose, and there is no evidence that this was refused.

At the same time, it is to be observed, that it does appear, that accounts were kept by them and their factor, but from whence the vestige of evidence does not arise, of any intromission prior to the 1709. The petitioner, in this case, first takes it for granted, without any evidence, and contrary to the highest probability, that Innes and Clark had an intromission with the rents prior to the 1709, and from thence he concludes; that they ought to be found liable, *retro*, to the 1694, because they have not preserved accounts of these intromissions. The respondents, on the other hand, do, with sound reason, contend, that as there is no evidence of Innes and Clark's having any intromission with the rents, prior to the 1709, so they could not keep accounts of intromissions which never existed. The petitioner, in this case, takes for granted, the very thing to be proved.

And it is material, in this case, to observe, that the conveyance in favour of Innes and Clark does not specify the rents for any particular period, but in general, the rents *bygone and in time coming*, agreeable to the ordinary stile of such writings; and therefore, before the petitioner could, at any rate, make a charge against Innes and Clark, for rents preceeding the 1709, he behoved to show what was the extent of these bygones. The first conveyance is dated in October 1709, and the bygones conveyed, may very properly

properly apply to the first term of the rents 1709, and which is all that can well be presumed was then resting; and an intromission, at any rate, can never be presumed, without showing that there was a subject to intromit with. If the petitioner could bring satisfying evidence, that the rents were *in medio*, unuplifted from the 1694 downwards, at the date of Innes and Clark's right, the petitioner might, with some more reason, argue, that Innes and Clark's intromission, with these rents, ought to be presumed, unless it could be shown, that they were lost by insolvency, removal of tenants, or uplifted by others; but the petitioner can never be allowed to presume, without evidence, a thing in itself altogether incredible, viz. that sixteen years rents remained in the tenants hands, unuplifted, at the date of Innes and Clark's right, and, upon that absurd presumption, to graft a second presumption, viz. that Innes and Clark intromitted with the whole of these rents. The respondent apprehends it to be a clear case, that before an intromission can be presumed against any person, the subject with which he could have intromitted, must be pointed out and ascertained.

It was formerly stated to your Lordships, as a strong circumstance, in this case, in favour of the respondents, that when this very petitioner's father, John Cuthbert of Castlehill, brought an action against Innes and Clark, to account, he *only* concluded for crop 1711, and the crops subsequent thereto; and that he certainly knew much better how that matter stood than any person now living possibly can, as it appears that he got right to Innes and Clark's backbond, as early as the 1713. The petitioner, sensible of the force of that circumstance, endeavours to give it a go-by, and says, that though the summons in the 1732, concludes only for the rent 1711, and subsequent years, yet it contains a separate conclusion for the sum of 50,000 merks, which was more than sufficient to comprehend the intromissions prior to the 1711.

But the petitioner cannot surely expect, that your Lordships will be moved with such an argument. Is it possible to maintain, that because Castlehill did, in his summons, allege, that Innes and Clark had intromitted with a separate subject, that was in value more than the rents of Cannibby, betwixt 1694 and 1711, that this implied an averment upon the part of Castlehill, that Innes and Clark had intromitted with the rents of Cannibby from 1694, when,

37

when, at the same time, in his summons, he only concludes against them for the 1711, and subsequent crops? The summons is clear, and will speak for itself. It concludes against Innes and Clark's representatives, and Sir Patrick Dunbar, for the sums therein specified, as the yearly rent of the lands of West Cannisby, intromitted with, and uplifted by them, or either of them, and "that for the crop and year 1711, and yearly since syne, and in "time coming, during their or either of their possessions thereof: "And, in like manner," the said Innes and William Clark, as representing their said deceased fathers, ought and "should be decerned and ordained, by decret foresaid, to make "just count, reckoning, and payment to the said pursuer, as having "right, in manner above mentioned, of the sum of 50,000 merks "Scots as the extent of the debts, sums of money, and value of "the goods and gear, heritable and moveable effects, which belonged to the said deceased John Cuthbert, and intromitted "with, uplifted and disposed of by the said deceased Robert Innes, and Mr. Alexander Clark, &c."

With respect to the diligence demanded against Miss Stewart, and which, at moving the petition, was granted of consent, the respondents must beg leave to observe, that their agent, upon seeing this paragraph of the petition, immediately wrote a letter to Miss Stewart (of which a copy is hereto subjoined) and to which he received an answer, also hereto subjoined, and upon these, it is left with your Lordships to judge, whether the demand made in this petition, for a diligence, was done in the serious expectation of getting any thing material in consequence of it, or in the view of procuring a delay, and keeping the cause some longer in dependence.

In respect whereof, &c.

RO. MACQUEEN.

K

LETTER

The Lords Adhered

*Wideth the rest of this affair Dec^r 14
1714*

(30)

LETTER by the Respondent's Agent to Miss Stewart, referred to in the foregoing Answers.

Madam,

Edinburgh, 5th August 1771.

IN a petition presented to the Court of Session for Alexander Cuthbert Esquire, I observe it said, that application was made to you, on his account, to make search for letters of correspondence betwixt provost Clark of Inverness, and Mr. Innes of Mondole, and your father, and also your father's account-books, but that you being connected with some particular friends of Mr. Sinclair of Duran, it is insinuated, that none of these letters and account-books will be shown by you, without the approbation of these friends of Duran's.

I beg to be informed by you, in return to this, whether there is any foundation for this insinuation, or that you have been desired by any person, on the part of Mr. Sinclair of Duran, not to give inspection of any papers to Mr. Cuthbert, or his agent or doers; and, at the same time, you will please inform, whether they have had such inspection, and when.

The A N S W E R.

S I R,

I Have just now received your letter, which surprises me much. At Mr. Cuthbert's desire, I searched all my father's papers, for an inventory and receipt on it, of papers belonging to provost Clark and Innes of Mondole, which he wanted (by which inventory, I found there was due my father, by five accounts, above seven hundred pounds Scots). Mr. John Frazer gave him it on his receipt. Some days after, at the desire of Mr. Frazer of Gortleg, I made another long and troublesome search for letters and accounts,
when

when I found five accounts, which I suppose are those mentioned in the inventory, and forty-seven letters; Gortleg read here thirty-nine of them, the other eight, with the five accounts, I gave Mr. John Frazer to give him. This day seven-night he was for some hours looking over my father's account-books; he desired to leave them on the table till next day, that he would return again to read them, but he has not yet come. Believe me, Sir, I have had a great deal of trouble in this affair. I can with truth assure you, *that none of Mr. Sinclair of Duran's friends desired me not to give inspection of any papers to Mr. Cuthbert or his doer.* I am, with regard,

S I R,

Edinburgh, 5th

August, 1771.

Your humble servant,

MARJORY STUART.

Nota; Mr. John Frazer informs, that he gave inspection of the above eight letters and five accounts, to the petitioner's agent, immediately after they were put into his hands.



N^o 2. AUGUST 10, 1767.

Unto the Right Honourable the Lords of Council and Session,

THE
P E T I T I O N
O F

Sir Ludovick Grant of Grant, Baronet, and others, Creditors of the deceased *Alexander Sutherland* of *Kinminity*, and *James Sutherland-Murray* of *Clyne*, eldest Son and apparent Heir of the said *Alexander Sutherland*,

Humbly sheweth,

THAT, by Decreet-arbitral in the 1728, the said *Alexander Sutherland* was found liable in 20,000*l*. Scots to Sir *Kenneth Mackenzie* of *Granville*, in the Right of which Debt Sir *Kenneth* was succeeded by Sir *George Mackenzie*, and the latter, by his Relict, Lady *Mackenzie*.

Both Sir *Kenneth* and Sir *George Mackenzie* were greatly incumbered with Debts, and their Creditors having used Arrestments in the Hands of *Kinminity*, brought sundry Processes of Forthcoming against him about the 1734, and obtained Decrees; upon which *Kinminity* paid to them the Sums decerned for. Among others, the deceased *William Garden*, Writer in *Edinburgh*, having had Right to a Debt of Sir *George's*, originally due to *Strachan* of *Glenkindy*, and having likewise attached this Fund, *Kinminity* raised a Process

A

cess

Jan. 12,
1754.

cess of Multiple-poin ding, in which he called Mr. Garden, *James Craig*, Writer to the Signet, and other Creditors of Sir *George Mackenzie*. A Decreet was thereupon pronounced in the 1734, ranking those Creditors, and by which Mr. Garden was preferred for 720*l.* 13*s.* Scots of Principal, with Annualrent from *Lammas* 1722.

It now appears, that the Debt contained in the Decreet-arbitral, was thus nearly exhausted, by the Payments made to the Creditors, who had attached it, so early as the 1737 or the 1738; but, a great many Years thereafter, *Kinminity's* Affairs having gone into Disorder, a Ranking of his Creditors was brought, and a Sale of his Estate. In that Ranking, *Lady Mackenzie*, the Relict of Sir *George*, as deriving Right from him, to what might be due of the said Debt, constituted by the Decreet-arbitral 1728, was ranked for 1571*l.* 3*s.* Scots of Principal, as the Balance supposed to be due.

That the Estate of *Kinminity* was afterwards sold, at a Price so high, as to afford good Ground of Expectation, that there might be Sufficiency for Payment of the postponed Creditors, and even a Reversion falling to the Heir. A Remit was thereupon made, first to the late Lord *Justice-clerk*, and thereafter to the Lord *Stonefield*, for adjusting the Scheme of the Division, and settling any Disputes that might arise previous thereto.

Accordingly, various Questions did arise, owing to Creditors having obtained Places in the Ranking for Debts, which had been paid in whole or in Part. Such improper Claims had the easier pass, owing to the House of the Common Debtor at *Tarmore* in *Banffshire*, having been burnt in the 1750, whereby the whole Furniture and Papers therein were consumed; and the Preservation of any of *Kinminity's* Papers, was owing, either to their having been on Record, or accidentally at another House, which he had in *Sutherland* where he some times resided.

Under

1 3 1

Under this Disadvantage, it was no easy Matter for the postponed Creditors, or the Heir, to trace out proper Vouchers for correcting those Wrongs; but sundry Discoveries were made, particularly as to partial Payments of the Debt above mentioned, received by Sir *George Mackenzie's* Creditors, in pursuance whereof, upon a Remit to the late Mr. *Farquharson*, the Balance claimed by Lady *Mackenzie* suffered a further Restriction to the Sum of 1030*l.* 11*s.* 10*d.* Scots, bearing Interest from 1st *February* 1734; and the Lord Justice Clerk, then Ordinary, approved of the Report making that Restriction. Feb. 9th,
1763.

In *June* 1766, Lady *Mackenzie* applied to the Lord *Stonefield* Ordinary, for a Warrant on the Purchaser of the Estate for Payment of the Sum last mentioned, and, no Objection being then made, his Lordship, on the 21st *June*, granted Warrant accordingly, superseding Extract till the 1st *August* hereafter; the Intention of which was, that there might be Time for enquiring after further Documents to restrict her Claim.

Accordingly, the Petitioners having discovered what they thought satisfying Evidence of a further Payment of that Balance, they gave in a Representation, praying that the Warrant might be stopped, in respect of the Decreet of Preference obtained by Mr. *Garden* as above mentioned, and Payment made to him in consequence thereof. The Representation was ordered to be answered; but, as the Decreet of Preference was not produced, a Diligence was granted to the Petitioners for recovering the same. The Petitioners extracted both first and second Diligence against Mr. *William Fraser*, in whose Hands that Decreet appeared to have been, from a Receipt after mentioned; but Mr. *Fraser* having failed to appear and exhibit, the Lord Ordinary, on the 12th *February* last, "circumduced the Term against the Petitioners, refused the Desire of the Representation, and adhered to the Interlocutor represented against."

Against

1 4 1

Against these Interlocutors the Petitioners gave in a Representation, resumng the Evidence already in the field, upon which they apprehended the Debt fell to be restricted. Answers were put in thereto, insisting, that, as the Petitioners had failed, either to produce the Decreet 1734, in Mr. Garden's favour, or to point it out in the Record, their Allegation, as to that Decreet, was to be held as groundless. The Lord Ordinary was thereupon pleased to *refuse* the Representation.

The Petitioners were thus obliged to have recourse to the Record ; and, having there found the Decreet by which Mr. Garden stood preferred, they obtained from the Keeper a Certificate thereof, setting forth the Terms in which the Preference was expressed. This Certificate they gave in to Process, along with another Representation, referring thereto, and reclaiming against the former Interlocutors, but the Lord Ordinary was pleased, on the 30th July last, to *refuse* the Representation, without Answers.

The Petitioners now find themselves obliged to apply to your Lordships for preventing this Lady from carrying off a Part of the Price of the Estate, to which she has clearly no Right. The Petitioners humbly apprehend, that, notwithstanding her having obtained a Place in the Decreet of Ranking of the Creditors of *Kimminty*, as deriving Right from her Husband, Sir George, to the Balance due of the Sum contained in the Decreet-arbitral 1748 ; yet it is competent, while the Price or Fund of Division is *in medio* to instruct, that she has been ranked for too much ; that the whole, or Part of the Balance, supposed to have been due, was actually paid, or that, if still resting, it clearly belongs to another, who may either claim it from this Fund, or recover it from the apparent Heir, in case he should represent the Commondebitor, by taking the Reversion of the Price.

This is no more than what has been already done, with regard to the very Debt in question, in the Course of this Division ;

vision; for, after the Estate was sold, and the Price came to be divided, the Voucher of the Payment of Part of this Debt, which had been made by *Kinminity* to Mr. *Craig* on the first *February* 1734, was recovered, and, upon Production thereof, Lady *Mackenzie's* Claim was restricted, from that for which she was ranked, to the above mentioned Sum of 1030*l.* 11*s.* 10*d.* *Scots*. It is true, that Mr. *Farquharson's* Report, finding this last Sum to be the Balance due to her, was afterwards approved of by the late Lord Ordinary, some time before the present Objection was made: But, if the Objection now appears well founded, on Grounds which were not then discovered or attended to, it surely must be still competent, as Justice will not permit a Person to draw as Creditor, Money which has either been already paid, or to which the appears to have no Right.

The first Point then to be ascertained, is the Fact of Mr. *William Garden*, as Creditor to Sir *George Mackenzie*, having obtained a Decreet of Preference upon this Debt, then due to Sir *George*, to a certain Extent, antecedent to the Lady's Right, whereby Sir *George* was divested thereof, and the Right transferred to Mr. *Garden*, to whom *Kinminity* was decerned to pay the same.

This Fact is clearly instructed by the Excerpt of the Decreet obtained by Mr. *Garden* against *Kinminity* and Sir *George*, upon the 12th *January* 1734, and which is certified by Mr. *James Ker*, Keeper of the Records in the Laigh Parliament-house. The Excerpt bears, that the Lords did thereby “pre-
 “fer the said *William Garden*, Writer in *Edinburgh*, *pari pas-*
 “*su* with the said *Alexander Sutherland* of *Kinminity*, upon the
 “foresaid remaining Sum, due by him, the said *Alexander*
 “*Sutherland*, as said is, for Payment and Satisfaction to him,
 “the said *William Garden*, of the Sum of 720*l.* 13*s.* *Scots*
 “yet remaining of the Proportion of the said Debt due to
 “the said Sir *Patrick Strachan* of *Glenkindie*, and to which
 “the said *William Garden* has now Right, effeiring and cor-
 B “responding

“ responding to the said Sum of 16,000 *l. Scots*, with Annualrent of the said remaining Proportion, from *Lammis* 1722, and in Time coming, during the Not-payment, with a fifth Part of the said remaining Proportion of liquidate Expenses.”

The Excerpt, thus certified by the proper Officer, proves all that is material to the present Question ; and the Decreet itself being on the Record of the Court, falls to be considered in the same Light as if an Extract thereof were produced in this Process. If Lady *Mackenzie* is desirous of perusing the whole Decreet, she, or her Agent, will have immediate Access to the Record itself.

As the Petitioners apprehend, it is thus clearly proved, that Mr. *Garden* was preferred by an extracted Decreet *in foro*, upon the Debt in question, to the Extent above mentioned, whereby Sir *George Mackenzie*, the original Creditor, and his Lady, as now come in his Place, were totally excluded, so it is submitted to your Lordships, that, although the Petitioners have not been able to recover the Discharge of this Part of the Debt granted by Mr. *Garden*, yet there is here sufficient Evidence to presume, especially *post tantum temporis*, that the Sum for which Mr. *Garden* stood preferred, was actually paid to him.

For, *1mo*, *Kimminity* continued in good Credit and Circumstances, during many Years after Mr. *Garden*'s Decreet in the 1734, and no Reason has been assigned to make it probable that Mr. *Garden* would lie long out of that Money after obtaining Decreet, especially as he was preferred in Right of a Debt that had been due by Sir *George Mackenzie*, whose Affairs were then greatly involved.

2do, By the same Decreet 1734, Mr. *James Craig* and others, as well as Mr. *Garden*, were preferred for different Part of the said Debt; and it has been proved by Discharge: particularly Mr. *Craig*'s, recovered since the Sale of the Estate of *Kimminity*, owing to its having been registrate before *Kimminity*

minity's House was burnt, that each of the other Creditors, so preferred by the Decreet 1734, received their full Payment from *Kinminity*, soon after that Decreet was obtained. This affords the strongest Cause to presume, that Mr. *Garden* did, in like manner, receive his Payment about that Time, more especially, as he was a Man of Business, and a Practitioner in this Court, and as he lived many Years thereafter, and made no Claim on the Decreet 1734, in the Ranking of *Kinminity's* Creditors.

3^{to}, It appears, by a Receipt produced, granted for the extracted Decreet 1734, by *William Frazer*, Agent in the Ranking of *Kinminity*, to *Kenneth Tulloch*, then Clerk to *Robert Gordon* Writer to the Signet, that this Decreet had been delivered up to *Kinminity*, upon Payment of the Creditors ; for Mr. *Gordon* was *Kinminity's* Doer, and as the Decreet must have remained with the Creditors thereby preferred, till fully satisfied, it is manifest that Mr. *Garden* must have been paid, as well as the rest, at the Time of the Decreet's being delivered up.

And, 4^{to}, There is produced a retired Bill, dated 14th February 1737, drawn by *Kinminity* upon *Alexander Stevenson* of *Montgreenan*, payable to the said *William Garden*, with Mr. *Garden's* Receipt on the Back thereof, for the Sum of 69 *l.* Sterling, or 828 *l. Scots*. As this Bill appears to have been paid not long after the Decreet, and as it is not alledged that *Kinminity* was otherwise Debitor to Mr. *Garden*, or had any other Transaction with him, it must be presumed that this Payment was made to account of the Sum for which Mr. *Garden* was preferred ; and that the rest of the Sum has either been paid down by *Kinminity* to Mr. *Garden*, at the Time of drawing the Bill, which is dated at *Edinburgh*, or else that it has been afterwards remitted to him, although the Voucher thereof cannot be recovered : The Loss of such Voucher, as well as of the total Discharge granted by Mr. *Garden*, is well accounted for by the Burning of *Kinminity's* House, which happened

pened in the 1750, together with the Confusion into which his Affairs fell, and the Lapse of Time being now above thirty Years.

It is humbly hoped that these Circumstances joined together, will satisfy your Lordships, that this Sum due to Mr. *Garden* has been actually paid to him by *Kinminity*, and, consequently, that it cannot be charged upon the Price of the Estate of *Kinminity*, as still due to Lady *Mackenzie*, in Right of Sir *George Mackenzie*, the original Creditor. But, even supposing there were not here sufficient Evidence of the actual Payment of the 720*l.* 13*s.* *Scots*, and Interest, for which Mr. *Garden* was preferred, yet it is undeniably proved by the said Decree 1734, that Sir *George Mackenzie* was to that Extent totally divested of the Debt due by *Kinminity*, under the Decree-arbitral 1728, in favour of Mr. *Garden*; and, consequently, that neither Lady *Mackenzie*, nor any other in the Right of Sir *George*, whether by Succession or posterior Conveyance, can have the least Pretensions to it. Such a Decree *in foro*, to which both Sir *George* and *Kinminity* were Parties, was, if possible, a stronger Transference of the Debt, than an Assignment intimated. Sir *George* was thereby denuded, and *Kinminity* became Debitor to Mr. *Garden*, and therefore Lady *Mackenzie* cannot be suffered to draw what she has clearly no Right to.

Nor is this Objection *jus tertii* to the Petitioners, for as Creditors, they have an Interest that no Person shall draw Part of the Price of the Bankrupt Estate, without having a clear Right so to do; and should the Price prove more than sufficient to answer the whole Debts, so that a Reversion would fall to the Heir, which is highly probable, though not yet quite certain, owing to the Subsistence of some Life-rents; it is plain, that the Petitioner, Mr. *Sutherland-Murray*, who is both a Creditor and apparent Heir, might be much hurt by Lady *Mackenzie's* drawing this Money, when the Right thereof

thereof belongs to another, supposing the Money not to have been paid to Mr. Garden. The Heir could not take the Reversion without representing *Kinminity*, and, in that Case, after the Money was gone, he might be distressed by a Claim at the Instance of those succeeding to Mr. Garden, in virtue of the Decreet 1734, whereby the late *Kinminity* was personally decerned to pay the Sum in question to Mr. Garden.

May it therefore please your Lordships, to alter the Lord Ordinary's Interlocutor before recited, and to find, that the above mentioned Sum, for which William Garden was preferred, falls to be deduced from the Debt claimed by Lady Mackenzie, as on the 12th January 1734, the Date of Mr. Garden's Decreet, and that Warrant can only be granted to her for Payment out of the Price of the Estate of Kinminity, of the Balance of the said Debt, (if any) after deduction as aforesaid.

According to Justice, &c.

D A V. R A E.

April 23. 1768.

A N S W E R S

F O R

Dame Elifabeth Mackenzie, widow of the deceased
Sir George Mackenzie of Grandville, Baronet,

T O

The PETITION of James Sutherland-Murray
of Clyne and Pulrossie, Esq; apparent heir of the
deceased Alexander Sutherland of Kinminity.

Captain Alexander Sutherland of Kinminity, having
contracted a variety of debts, Elifabeth Edwards
his widow, in the year 1722, came to a composi-
tion with his personal creditors, and agreed to give
among them L. 16,000 Scots, in full of their debts, in pro-
portion to the extent of them.

Among other debts due by her husband, was a bond dated
19th January 1719, granted to Sir Patrick Strachan of Glen-
kindy, for L. 8338 : 17 : 4 Scots.

Of this debt Elifabeth Edwards had paid to Sir Patrick
L. 271 : 15 : 6 Sterling at Lammas 1722 ; but as accounts
were not cleared betwixt her and Sir Patrick, she, when she
granted her security for the above L. 16,000 Scots to the o-

A

ther

Reply to be applied for

Aug. 4. 1722. ther creditors, granted likewise, of this date, an obligation to Sir Patrick, narrating, " That Sir Patrick Strachan, in
 " implement of a previous contract betwixt him and Alex-
 " ander Sutherland's creditors, assigned her to L. 8338, 17 s.
 " 4 d. Scots, with interest and penalty, by her husband's
 " bond to Sir Patrick, 19th January 1715; therefore she be-
 " came obliged to pay to Sir Patrick a proportional part of
 " L. 16,000 Scots, corresponding to the above sum of L. 8338,
 " 17 s. 4 d. Scots, and annualrents of the said proportion
 " from Martinmas 1718, deducting from the proportion
 " L. 271 : 15 : 6 Sterling, and annualrents thereof from Lam-
 " mas then past, to the term of payment above written, and
 " continually, until allowance thereof is given, betwixt her
 " and the said Sir Patrick, in regard she did make payment
 " to him, at the said term of Lammas, of the said sum of
 " L. 271 : 15 : 6 Sterling, which he, the said Sir Patrick, had
 " accepted of, in part of the proportion arising as said is."

This is instructed from the decret of preference on record, an excerpt from which has been produced by the petitioner before the Lord Ordinary.

It eventually, however, turned out, upon a comparison of the debts, that Sir Patrick Strachan was rather overpaid of his proportion of the L. 16,000 Scots, by the above L. 271, 15 s. 6 d. Sterling.

Elisabeth Edwards having acquired right, in manner fore-
 said, to the debts of her deceased husband, did, on 9th July
 1725, lead an adjudication of his estate for L. 43,160 : 6 : 8
 Scots, and acquired right to another adjudication against
 him, led by Grant of Auchoynany, for the accumulate sum
 of L. 3116 Scots.

And the said Mrs Elisabeth Edwards, in the marriage-
 Jan. 14. 1726. contract entered into of this date, betwixt her and Sir Ken-
 neth Mackenzie of Grandville, her second husband, became
 bound to dispoise to him, in name of tocher, the foresaid ad-
 judications,

judications, to the amount of L. 16,000 Scots; for which he, on the other hand, became bound to infest her in an annuity, out of his estate, to the amount of about L. 100 Sterling *per annum*; and thereafter, in the 1727, she, in implement of the marriage-contract, and for certain other causes, disposed to her said husband Sir Kenneth, the foresaid adjudications, and certain other subjects, under the burdens and conditions therein mentioned.

† And by decret-arbitral in the 1728, proceeding upon a submission betwixt the late Alexander Sutherland of Kinminity and the said Sir Kenneth Mackenzie, the said Alexander Sutherland was found liable to Sir Kenneth in the sum of L. 20,000 Scots, as the balance remaining due upon the foresaid debts.

The right of the foresaid L. 20,000 devolved upon Sir George Mackenzie, the son of Sir Kenneth, who confirmed the same as executor of his father; and Sir George was succeeded by his widow and executrix, Lady Mackenzie, the respondent.

It has been already observed, that Mrs Elisabeth Edwards had granted an obligation to Sir Patrick Strachan, for his proportion of the L. 16,000 Scots for which she had compounded her husband's debts; and that she had made payment to Sir Patrick of L. 271 Sterling, which, in fact, did rather overpay Sir Patrick Strachan's proportion.

But before this was known, by proportioning the L. 16,000 among the debts, Sir Patrick's affairs having gone into disorder, he and his creditors employed William Garden writer in Edinburgh, to look after this debt, and see if any thing could be made of it.

At this time, which was in the beginning of the year 1734, sundry creditors of Sir Kenneth and Sir George Mackenzies laid on arrestments in the hands of those who had intromitted with the subjects of Alexander Sutherland of Kinminity, in order to reach the L. 20,000 Scots, in which, by the decret-arbitral 1728, Alexander had been found liable

ble to Sir Kenneth ; and, among others, in the hands of the petitioner's father, which produced a multiple-pounding.

Upon this occasion William Garden, who had obtained no decree constituting him in any respect creditor to Sir George Mackenzie the common debtor, and who had done nothing to attach the funds which were the subject of the competition, produced in the multiple-pounding the above obligation from Elisabeth Edwards to Sir Patrick Strachan, and asked preference for the random sum of L. 720, 13 s. Scots, which he accordingly obtained.

This decret, in so far as respected Mr Garden's preference, was most irregular, and indeed null and void. No decree of constitution had been obtained against Sir George Mackenzie ; no arrestment used in the hands of Kinminity ; neither Mr Garden nor Sir Patrick his author were called in the multiple-pounding ; there was no debate nor compearance made for Sir George ; but the whole was in absence as to him.

In the year 1744, a ranking of Kinminity's creditors and a sale of his estate was brought in this court. In the ranking, Sir George Mackenzie, in whose right the respondent now is, was ranked by Lord Tinwall, before whom the ranking depended, for L. 1571, 3 s. Scots, as the balance of the L. 20,000 Scots due by Kinminity.

Thereafter the petitioner, (his father Alexander being then dead), assuming the name of the creditors, (who clearly had no concern in the matter, as after paying the whole creditors, there remained a considerable reversion to the petitioner), objected to the balance found due by the decret of ranking ; and, of this date, gave in an account, by which he proposed to diminish it to L. 607 : 6 : 7 Scots.

In this account given in by the petitioners, it is to be observed, that credit is taken by them for L. 2520 Scots, as paid to James Craig, one of the persons who had obtained

a preference in the foresaid multiple-poiding, and for L. 318, 19, 7 Scots, as paid to other two of the parties, who had likewise obtained preferences in the multiple-poiding; but not one farthing is stated as paid to William Garden or his authors; and for the payment of this debt due to James Craig, his discharge is produced; and this discharge narates, That a preference was likewise given to William Garden for the sum now in dispute; which clearly shows, that the petitioners were then satisfied that Mr Garden had never received payment from Alexander Sutherland, as otherwise they would not have failed to have sought allowance of William Garden's debt, as well as of the others, when he was not ignorant of the preference which William Garden had obtained.

To the foresaid account, the respondent gave in objections; to which answers were made by the petitioners; in which they alledged, That Alexander Sutherland had made payment to Mr Garden of the sum decerned to him; in consequence of which they were allowed a diligence to recover vouchers of payment; but they made no use of this diligence; and therefore the Lord Ordinary, of this date, pronounced the following interlocutor. Feb. 24 1762. " Having advised the foregoing objections and answers, repels the first objection made to the account given in, in respect of the answers; but sustains the second objection made for Lady Mackenzie to said account; and circumduces the term against the said John Gordon and other creditors, in respect they have failed to extract and report the diligence formerly granted to them for recovering further documents and instructions of payment." The import of this interlocutor was to repel the objection made to the debt now in question.

It will be unnecessary to trouble your Lordships at present with resuming the several steps of procedure, and the various arts and devices that were fallen upon by the petitioners to

B

protract

protract and delay the cause. These are stated at full length in the answers to the former petition. It is sufficient to observe, that a remit having been made to Mr Francis Farquharson to make up a new account, and state the balance due to the respondent, he after sundry meetings with the parties or their doers, in which, when the petitioner made every claim, and stated every argument he could think of, the whole ended in Mr Farquharson's making a report, finding L. 1030:11:10 Scots due to the respondent, with interest from 1st February 1734; and the cause having thereafter been remit to the Lord Stonefield, in place of the former Ordinary, his Lordship, of this date, pronounced the following interlocutor. " Grants warrant to, and decerns
 " and ordains the purchaser to make payment to the said
 " Dame Elisabeth Mackenzie of the foresaid sum of L. 1030,
 " 11 s. 10 d. Scots, and interest thereof, from and since the
 " 1st February 1734, and in time coming, during the not
 " payment; superseding extract till the 1st of August." And to this interlocutor his Lordship adhered, by two subsequent interlocutors, viz. 12th February and 30th July 1767.

The petitioners reclaimed to your Lordships; who, upon
 Dec. 24. 1767 advising the petition and answers, of this date, pronounced the following interlocutor. " The Lords having heard this
 " petition, with the answers, and having considered the re-
 " cord of the decret, from which it appears, that any claim
 " William Garden had was upon Sir Patrick Strachan's debt,
 " and not upon Sir George Mackenzie's, they adhere to the
 " Lord Ordinary's interlocutor, and refuse the desire of the
 " petition: find expences due, and ordain an account to
 " be given in; superseding extract till the 15th of January."
 Feb. 6. 1768. And by an interlocutor, of this date, your Lordships modified the expences to L. 20 Sterling.

Against the foresaid interlocutor a petition was presented to your Lordships no earlier than the 10th of March, long after

after the reclaiming days were run. This petition your Lordships have ordained to be seen and answered; and in obedience thereto, these answers are humbly offered.

The grounds upon which the petitioner insists for an alteration of the interlocutors are, That they had lately discovered the inventory of the interest that was produced by William Garden, as assignee of Sir Patrick Strachan in the fore-said process of multiple-poining that was raised by Mr Sutherland of Kinminity, against Sir George Mackenzie and his creditors; from which it does appear, that William Garden, in that multiple-poining, did claim, not as a creditor of Sir Patrick Strachan, but as a creditor of Elisabeth Edwards, and as Sir George Mackenzie was liable for the debts of Elisabeth Edwards; therefore William Garden was intitled to claim to be ranked as a creditor upon Sir George Mackenzie's funds; and that the petitioners are therefore intitled to retain out of the balance in their hands the sum for which Mr Garden was preferred in the fore-said multiple-poining.

This is the substance of the petition; and although the petitioner does set forth, That Sir George Mackenzie was liable for the debts of Elisabeth Edwards, yet he has not pointed out upon what medium he was liable. It is evident, that Sir Kenneth, Sir George's father, was not liable for the fore-said debt due by Elisabeth Edwards to Sir Patrick Strachan, Mr Garden's author, upon the footing of their marriage-contract; for where a wife does, in her marriage-contract, convey any particular subject to her future husband, *nomine dotis*, and where the husband, on the other hand, in consideration thereof, settles a life-rent-provision upon his wife, the husband takes the tocher as purchaser, and cannot, in that character, be liable for the debts of the wife; and although the husband is liable for the wife's moveable debts *jure mariti*, yet the obligation granted to Sir Patrick Strachan, being an obligation bearing a stipulation of interest, was heritable

ritable *guard* the husband, and for which he was not liable; and although he had been liable, yet, having granted no obligation for it, nor having been established against his estate, during the subsistence of the marriage, he could not be subjected for that debt of his wife, after the marriage was dissolved.

The respondent does, at the same time, fairly confess, that by a subsequent disposition granted by Elisabeth Edwards, containing a conveyance of other subjects, Sir Kenneth Mackenzie, her husband, is burdened with the payment of her debts, and as Sir George Mackenzie represented his father, the respondent does confess, that Sir George would likewise be liable for Elisabeth Edwards's debts. But the respondent does at the same time humbly contend, that it will by no means from thence follow, that the interlocutor reclaimed against ought, on that account, to be altered; and that the petitioner is intitled to retain the sum for which William Garden was preferred in the foresaid multiple-poining.

In the *first* place, your Lordships will observe, that the interlocutor reclaimed against was pronounced upon the 24th December 1767. The petition was presented no earlier than the 10th of March 1768; so that the interlocutor had become final, and must thereby have the effect of a *res judicata*; and it is altogether incompetent again to enter into the question, whether the interlocutor is well founded or not.

It is in vain for the petitioners to pretend to support the competency of this petition, by alledging, that the facts upon which they now put their plea, were *noviter venientia ad notitiam*, when it appears from the date of the excerpt of the decree 1734, produced by the petitioners themselves, that they must have perused that decree as far back as July last; and from thence they behoved to have discovered the nature of the production that was made by Mr Garden in the foresaid multiple-poining; and if they neglected, during the course of several months,

months, to put their plea, upon what now appears to them to be a proper footing, they themselves are only to blame; and their neglect can be no reason why your Lordships should depart from the forms which have been necessarily established for the administration of justice.

2do, Supposing the petition competent, yet the respondent does humbly beg leave to dispute the relevancy. For, *1mo*, Your Lordships will observe, that even although Sir George Mackenzie was liable for the debts of Mrs Elisabeth Edwards, yet no execution could pass upon the foresaid obligation granted by her to Sir Patrick Strachan, against Sir George, or his effects, until a decreet of constitution against Sir George was obtained, and his effects were properly attached by legal diligence; and therefore, as in the present case Mr Garden had obtained no decree of constitution against Sir George Mackenzie, and had taken no step of diligence to attach Sir George's funds in the hands of Kinminity, but throws in Elisabeth Edwards's obligation into the multiple-pounding, in which he had no interest to appear, and to which he was not called as a party, but takes a random decree, without any opposition, and entirely in absence of Sir George the common debtor, that decree was intrinsically null and void, and could be no bar to Sir George, or the respondent in his right, recovering his payment from Kinminity of the balance in his hands.

And, *2do*, Supposing that Mr Garden had even obtained a decree of constitution, and regularly used an arrestment in the hands of Kinminity, yet that would not have intitled him to take credit for the sum for which Mr Garden was preferred, unless he had paid that sum to Mr Garden; for notwithstanding such decree of preference, yet if the principal debtor should afterwards have paid the debt, the arrestment, and decreet of forthcoming, would be thereby sufficiently

ciently purged, and the principal debtor would be intitled to recover his payment from the arrestee.

In the present case, nothing else is produced, except the inventory of the interest that was produced for Mr Garden in the forelaid multiple-poin ding. This by no means can intitle the petitioners to take credit for the sums for which Mr Garden was preferred. Your Lordships have already heard, that the L. 271 Sterling, which Mrs Elisabeth Edwards had paid to Sir Patrick Strachan, was fully equal to his proportion of the L. 16,000 Scots which she became bound to pay to her husband's creditors; and therefore, as her obligation does not now appear, nor indeed any part of the interest that was produced for Mr Garden, the presumption of law is, that accounts have been settled betwixt him and Sir George Mackenzie, who, as representing Elisabeth Edwards, became liable for the debt; that the balance, if any, had been paid up by him, and Elisabeth Edwards's obligation accordingly retired. The obligation by Elisabeth Edwards to Sir Patrick was a mere personal obligation, that was extinguishable by the simple act of retiring; and which, when retired by the principal debtor, he had no occasion longer to preserve: and when the document of debt does not appear, the presumption of law is, that such has been the case; and which must be an effectual liberation to the principal debtor, and all concerned.

It is insinuated by the petitioners, That the debt had been paid by Kinminity, in consequence of the decree of preference; and that therefore they are intitled to take credit for the sum.

But, in the *first* place, It is not very likely that Kinminity would have paid in consequence of a decree, which, in so far as concerned William Garden's interest, was intrinsically null and void. The funds in the hands of Kinminity were the proper funds of Sir George Mackenzie; whereas Mr
Garden

Garden claimed upon an obligation granted by Elifabeth Edwards, without any attachment of the funds, or without so much as a constitution of the debt against Sir George, or the vestige of evidence that Sir George was liable for her debts; but all proceeds in absence of Sir George, without the smallest debate or opposition, when at the same time Mr Garden was not so much as made a party to the action.

2do, The case of Kinminity is very different from that of a principal debtor. Where the ground of debt does not appear, the presumption of law is, that it has been retired by the principal debtor; but where payment is made by a party who is intitled to relief, or to state the payment against a third party, there it is necessary that the document of debt be preserved: And therefore the law will never presume that the debt was paid by Kinminity, when the ground of debt is not produced by him, without which he is not intitled to take credit for the debt against the principal debtor.

It was said, That Mr Garden's receipt in the 1737, for a bill of L. 828 Scots, drawn by Kinminity upon Mr Stevenson of Montgreenan, in his favour, was payment of the sum decerned for in the decret 1734; and that the reason why Mr Garden's discharge, and the document of debt, are not produced, is, that Kinminity's house of Tarmore was burnt in the year 1750.

But there is not the smallest room for considering the fore-said bill as payment of the debt in question. The bill, from the face of it, appears to have no connection with this debt; it is simply drawn for value; it could not be for the sum due by the decret 1734; for by it Mr Garden is preferred for L. 720, 13 s. Scots, and interest thereof from Lammas 1722; and likewise for a fifth part of the said L. 720, 13 s.; all which sums, upon the 14th February 1737, when that bill was drawn, or rather upon the 25th of that month,

when it was payable, amounted to about L. 1400 Scots; whereas the bill is only for L. 828 Scots. Mr Garden was a man in great business at this time, who had extensive dealings in the country round where Kinminity lived, and with Kinminity himself; so that the bill has related to some other transaction; and what right the petitioner has to limit it to the transaction of the decret 1734, without evidence, and indeed against evidence, does not occur.

It is altogether affected to suppose, that Mr Garden's discharge, or the document of debt, were burnt in the house of Tarmore in the year 1750. Kinminity died in the 1740; the process of sale was commenced in the year 1744; and either in that year, or in the year 1745, every paper in that house was taken from it by warrant of the court of session, during the dependence of the sale. Indeed the production of the discharge which was granted by James Craig to Kinminity, in order to cut down the balance due to the respondent, as in the right of her deceased husband, does totally destroy the hypothesis of Mr Garden's discharge, &c. being burnt in the house of Tarmore; and as in stating the fore said account in the year 1762, the petitioner takes credit for L. 2520 Scots, as paid to James Craig, one of the parties who had obtained a preference by the decret 1734, and also for L. 318 : 19 : 7, as paid to the only other two persons who had obtained a preference by that decret, (William Garden excepted) and when, at the same time, not one penny is stated in that account as paid to Mr Garden, notwithstanding that his preference was expressly narrated in the discharge granted by James Craig; it affords the strongest proof that possibly can be, that the petitioner was satisfied that Mr Garden had received nothing from Kinminity.

As there is therefore no ground in law for presuming, nor indeed the smallest degree of probability, that Kinminity paid any thing to Mr Garden, in consequence of the decree

1734,

1734, but strong circumstances to point out the contrary ; so the petitioner can have no other interest in this question than to pay safely, and to be secured against any claim that may afterwards be brought against him, at the instance of Mr Garden's representatives, upon the decret 1734, of which they have not the smallest reason to be in the least apprehensive, as the decret is intrinsically null and void ; and, besides, the document of debt does not now appear, and which therefore must be presumed has been retired by the principal debtor. However, if your Lordships shall think it at all necessary, the respondent is willing to find sufficient caution, at the sight of your Lordships, to indemnify the petitioner against any claim that may be brought against him, at the instance of Mr Garden's representatives.

Upon the whole, the respondent humbly hopes, that your Lordships will have no difficulty to find, that the respondent is intitled to the balance ascertained by the Lord Ordinary's interlocutor, and therefore to refuse the petition ; and supposing your Lordships were of opinion, that the interlocutor ought to be altered, yet the respondent is humbly persuaded, that your Lordships would, notwithstanding, find her intitled to the expences awarded by your interlocutor of the 6th February last, because these expences have been incurred by the vexatious proceedings of the petitioner's having maintained the litigation, for more than six years, upon grounds that were either totally irrelevant, or not founded in fact, and which indeed appear to have been calculated for no other purpose than to spin out the cause.

In respect whereof, &c.

R O. MACQUEEN.

March 10. 1768.

Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N
O F

James Sutherland-Murray of Clyne and Pulrossie, Esquire, apparent heir of the deceased Alexander Sutherland of Kinminity,

Humbly sheweth,

THAT Capt. Alexander Sutherland of Kinminity, grandfather to the Petitioner, having contracted sundry debts to a very considerable amount, the same were purchased by his relict Elisabeth Edwards; who, on the 21st February 1718, entered into a contract with the several creditors, by which they became bound to assign and dispose their debts to her; and particularly Patrick, thereafter Sir Patrick Strachan of Glenkindy, became bound to assign to her the sum of L. 14582 due to him by the said Capt. Alexander Sutherland by bonds: and, on the other part, she became bound to pay to the creditors the sum of L. 16,000 Scots, to be divided among them in proportion to their respective debts.

That, in consequence of this contract, Elisabeth Edwards paid the most of the creditors, and took assignments to their debts: and particularly it would appear, that she made a partial payment to Sir Patrick Strachan. For, on the 4th of August 1722, she, on a conveyance to his debt against Kinminity, granted an obligation to him for the sum of L. 8338 : 17 : 4 Scots, deducing therefrom L. 271, 15 s. 6 d. Sterling, paid in part of Sir Patrick's proportion of the L. 16,000.

That the widow, having in this manner acquired right to her
A husband

husband Kinminity's debts to a very considerable extent, did, on the 9th of July 1725, lead an adjudication of his estate, for no less a sum than L. 43,160 : 6 : 8 Scots; and acquired right to another adjudication against him, led by Grant of Achnynny, for the accumulate sum of L. 3116 Scots.

That, on the 14th day of January 1726, the said Mrs Elisabeth Edwards entered into a contract of marriage with Sir Kenneth Mackenzie of Granville; by which she became bound to dispose to him, in contemplation of the marriage, the adjudications before mentioned affecting the estate of Kinminity, and certain other subjects therein recited, with the burden of L. 568, 5 s. Sterling, contained in a list of debts contracted by her, in purchasing the foresaid debts affecting the estate of Kinminity. And, in implement of this marriage-contract, she did accordingly dispose to her second husband, Sir Kenneth, the foresaid adjudications, conform to disposition dated the 28th day of September 1727. Of which contract and disposition a copy is herewith produced; and both are registrate.

That Sir Kenneth having insisted in a process of mails and duties upon these adjudications, a Submission was entered into between him and the deceased Alexander Sutherland of Kinminity, (the petitioner's father), of Sir Kenneth's whole claims on the adjudications before mentioned; upon which there was a decret-arbitral pronounced in the 1728, finding Kinminity liable to Sir Kenneth in L. 20,000 Scots, in full of all the debts purchased by his lady; of which that purchased from Glenkindy was a part; and the decreets of adjudications, and decret-arbitral, are in process.

It appears, that Sir Kenneth paid none of the debts due by his lady; and he having died soon after his marriage, they were equally ill paid by his brother and heir Sir George Mackenzie. For, in the years 1726, 28, 30, and 1731, there were sundry arrestments used in Kinminity's hands by Sir Kenneth and his lady's creditors, and particularly by several of the creditors from whom his lady had purchased the debts affecting Kinminity, and taken her security. And several of these creditors having, in the year 1730, raised sundry processes of forthcoming, in this court, against Kinminity as debtor to Sir George, he was obliged to bring a process of multiple-poinning, in the year 1731, against Sir George and his creditors. In which sundries produced their interest, founded upon bonds, bills, or obligations granted by Mrs Elisabeth Edwards; and which Sir Kenneth, and Sir George his heir were bound

bound to pay in manner before mentioned. Particularly James Cra-
 writer to the signet, produced his interest as creditor to Sir George

In this same process of multiple-poin ding Kinminity himself
 produced an interest as creditor to Sir George, being a bond gra-
 ed by Elisabath Edwards to Mrs Mary Sutherland, in the 1711
 and another bond granted by her in the 1722; to both which he
 acquired right by separate assignations in the 1729; upon which
 he of course fell to get compensation out of the sum in the decreet
 arbitral pronounced the year before.

In the same process William Garden, writer in Edinburgh, pro-
 duced an interest. And as this interest is the foundation of the pre-
 sent question, the petitioner will copy verbatim the inventory of the
 interest produced for him; the principal whereof is in the hands
 of Mr Bruce depute-clerk; and which the petitioner had the good
 luck to discover among a multiplicity of old processses in Mr
 Bruce's closet within these, four days only.

" Inventory of the interest produced by William Garden wri-
 ter in Edinburgh, as assigney by the deceased Sir Patrick Strachan
 " of Glenkindy, in the process of multiple-poin ding raised by Mr
 " Sutherland of Kinminity against Sir George Mackenzie of Cro-
 " martie, and his creditors.

" 1. Principal obligation by Elisabath Edwards, therein designed
 " relict of Captain Alexander Sutherland of Kinminity, to the said
 " Sir Patrick Strachan, dated 4th August 1722; and bearing on
 " the back, to be registrate in the register of probative writs of
 " Banff, 6th Sept. 1725.

" 2. Letters of inhibition raised thereupon, with one execution;
 " both duly registrate."

" 3. Disposition, registrate in the books of session, by the said
 " Sir Patrick to William Garden foresaid, containing the subject
 " above mentioned specially disposed."

That it is unnecessary to state particularly the interest produced
 for twelve other creditors, as appears from the inventories and
 copies of arrestments in the hands of the clerk to the process. It is
 enough for the present purpose, to inform your Lordships, That
 there was a decree pronounced, ranking and preferring the credi-
 tors, on the 12th of January 1734; " whereby the Lords did pre-
 fer the said William Garden writer in Edinburgh, *pari passu*,
 " &c. with the said Alexander Sutherland of Kinminity, upon
 " the foresaid remaining sum due by him the said Alexander Su-

“therland, as said is, for payment and satisfaction to him the said William Garden of the sum of L. 720, 13 s. Scots, yet remaining of the proportion of the said debt due to the said Sir Patrick Strachan of Glenkindy, and to which the said William Garden has now right, effecting and corresponding to the sum of L. 16,000 Scots, with annualrents of the said remaining proportion from Lammas 1722, and in time coming, during the not payment, with a fifth part of the remaining proportion of expences.” And by the same decree Mr Craig was preferred for L. 2520 Scots.

That Mr Sutherland of Kinminity's affairs having thereafter gone into disorder, a ranking of his creditors was brought, and a sale of his estate: In the course of which sale, Sir George's interest was produced, and his representatives were preferred for a large sum arising due upon the foresaid decret-arbitral. But the agent in the ranking having recovered the foresaid decret of preference, and a discharge by Mr Craig of the sums for which he was preferred, the same was deduced from the sum for which Sir George's representatives stood at first ranked.

That after the decret of ranking was extracted, and the estate sold at a very high price, a remit was made, first to the late Lord Justice-Clerk, and thereafter to the Lord Stonefield, for adjusting the scheme of division, and settling any disputes that might arise previous thereto.

Accordingly various disputes did arise, particularly anent the sum for which Sir George Mackenzie's representatives, and to which Dame Elisabeth Mackenzie, his widow and executrix has now right; and the same was, in consequence of a remit to the late Mr Farquharson, and his report, restricted to L. 1030: 11: 10, bearing interest since the 1st February 1734.

In June 1766, Lady Mackenzie applied to the Lord Stonefield Ordinary, for a warrant on the purchaser of the estate, for payment of this sum; which on the 21st June was granted.

That the petitioner and several of the creditors represented against this warrant, and set forth, that as William Garden was preferred, by the foresaid decret in the 1734, to the said sum of L. 720, 13 s. Scots, with interest thereof from Lammas 1722, the same ought to be deduced from the sum in the warrant, as well as the sum for which Mr Craig was preferred by the same decret: the more especially that there was produced a draught by the late Kinminity, the debtor, in favour of William Garden, on Mr Stone-

son of Montgreenan, dated 14th February 1737, for L. 69 Sterling; from which it is natural to presume, that this draught was in payment of the L. 720 Scots for which William Garden was preferred in the 1734, as said is. And this presumption was the stronger in that case, that Kinminity the debtor's papers were accidentally burnt in his closet of Tarmore in the year 1750, where probably the principal discharge of this L. 720 Scots was.

That, at this hour of the session, it is unnecessary minutely to state the particular steps of process. It will only suffice, that the Lord Ordinary having refused the representation on answers, a petition was preferred for Sir Ludovick Grant, a postponed creditor, and the petitioner: and the same having come to be advised, with answers, before your Lordships, on the 24th December last, when the petitioner ~~was~~ not in town, your Lordships were pleased to pronounce this interlocutor.

“ Having considered the petition, with the answers; and having
 “ considered the record of the decret, *from which it appears, that*
 “ *any claim William Garden had was upon Sir Patrick Strachan's debt,*
 “ *and not upon Sir George Mackenzie's*; they adhere to the Lord
 “ Ordinary's interlocutor, and refuse the desire of the petition; find
 “ *expences due*; and ordain an account to be given in, superseding
 “ extract till the 15th of January.” And by another interlocutor, of
 date the 6th day of February last, your Lordships were pleased to modify the expence to L. 20.

That the petitioner, notwithstanding the reclaiming days are elapsed, humbly apprehends it is competent for him to bring this cause again under your Lordships review; because, *1mo*, he can instantly satisfy your Lordships, that the interlocutor proceeds on a misrepresentation of the fact; and that, *2do*, from evidence recovered by him within these four days, by which it is proved beyond a possibility of dispute, that William Garden's claim, as assigney by Glenkindy, was originally due by Elisabeth Edwards, and thereafter by Sir Kenneth and Sir George Mackenzies, who became creditors to Kinminity in her right: and therefore it is as clear as the sun at noon-day, that your Lordships interlocutor proceeded upon a wrong *medium*; which the petitioner has not been able to shew till within these few days, that, in making other researches, it has been accidentally discovered. He therefore humbly hopes, that your Lordships will not be offended at this application, though at so late an hour, as the importance of the question to him, and the
 particular

particular circumstances of the case, with the fortunate new discovery, will no doubt plead in his favour.

May it therefore please your Lordships, to alter your former interlocutors, in regard that they proceed upon the supposition that any claim William Garden had, was upon Sir Patrick Strachan's debt, and not upon Sir George Mackenzie's; as that supposition is, not only by the above recital of facts, but by a discovery made within these four days, undeniably proved to be a mistake in point of fact; and as that claim is shewn to have been upon Sir George Mackenzie's debt against Kinminity, and not upon Sir Patrick Strachan's: and to find, that the above-mentioned sum, for which William Garden was preferred, falls to be deducted from the debt claimed by Lady Mackenzie, as on the 12th January 1734, the date of William Garden's decret; and that warrant can only be granted to her for payment, out of the price of the estate of Kinminity, of the balance of said debt (if any), after deduction as aforesaid.

According to Justice, &c.

JAMES BOSWELL.

I Andrew Sutherland, clerk to William Sutherland writer in Edinburgh, doer for the petitioner, did intimate to John Frazer writer to the signet, doer for the before-mentioned Lady Mackenzie, that this petition was to be boxed this day, and moved by the Lords to-morrow. This I did, by delivering to him a printed copy of the said petition, with a note of intimation thereon, between the hours of ten and twelve of this 10th day of March, 1768, before these witnesses, James Mitchell and Robert Randall, both apprentices to John Reid printer in Edinburgh.

INFORMATION

FOR

ROBERT GEDDIE junior, Merchant in *Cupar in Fife*, and ROBERT MACKINTOSH, Esquire, Advocate,

AGAINST

GEORGE DEMPSTER, Esq; of *Dunichen*.

THE District of Burghs, composed of the Towns of *Perth, Dundee, St. Andrews, Cupar in Fife, and Forfar*, was represented in the last Parliament of *Great Britain* by Mr. *Dempster* of *Dunichen*.

Mr. *Mackintosh* had a Connection with most of these Burghs, and, in some of them a considerable Interest; and, being desirous to serve his Country in Parliament, he declared himself a Candidate in the End of last Summer.

This Declaration alarmed Mr. *Dempster*, and the Progress which he saw his Opponent making in the Burghs, induced him rashly to resolve upon Measures in support of his Interest, which, it is hoped, he never would have resorted to, had not his Eagerness prevented him from coolly reflecting how improper and unconstitutional a Part he was about to act.

In what Manner Mr. *Dempster* proceeded in the other Burghs, it is not *hujus loci* to enquire; it is his Conduct in the Town of *Cupar* alone to which the present Prosecution relates.

Upon his Arrival at that Town, he immediately discovered, that, without having Recourse to Bribery and Corruption, he could have no Expectation of procuring the Voice of the Burgh in his favour; or of introducing into the Magistracy and Council,

at the last annual *Michaelmas* Election, such a Set of Magistrates and Counsellors for the present Year, as would secure to him a Majority of Votes in the Election of the Delegate to be appointed by the Burgh for choosing a Burgess to represent the District in the next ensuing Parliament, he therefore resolved to resort to this Method of Solicitation, and his Offers were so high as to have Influence upon several Members of the Council, though others, who were possessed of more Virtue, resisted every Attempt that was made to corrupt them.

Although Mr. *Dempster* endeavoured to conceal, as much as possible, the illegal Practices which he was thus carrying on, they were too general to remain secret, the Consequence whereof was, that, upon an Application to the Sheriff of the County, a Warrant of Commitment was granted against him, and he was obliged to find Bail to stand Trial for his Offences.

Mr. *Geddie* was, at that Time, eldest Baillie of the Burgh, and, as he considered it to be his Duty to protect its Freedom and Independency, and to secure the Morals of its Inhabitants from being corrupted from such Practices in Time coming, he early resolved to bring Mr. *Dempster* to publick Justice; and Mr. *Mackintosh*, who was chosen a Counsellor at the last *Michaelmas* Election, and was put upon the Leet for being Provost, heartily concurred with him in the intended Prosecution.

Criminal Letters were accordingly raised at the Instance of Mr. *Geddie* and Mr. *Mackintosh*, with the Concourse of his Majesty's Advocate, and were executed against Mr. *Dempster* upon the 21st of *November* last.

It was natural to expect that Mr. *Dempster*, had he been conscious of his Innocence, would have sought the earliest Opportunity of justifying himself, but, instead of doing so, he thought proper to prefer a Petition to the Court, upon the 26th of *November*, in which, after insisting that his Privilege as a Member of Parliament exempted him from the Necessity of granting Bail to stand Trial, he prayed your Lordships to sist all further Proceedings upon the Criminal Letters raised against him during the Session of Parliament, that he might not be further molested or hindered in the Attendance of his Duty in Parliament, and that the Privileges of that most Honourable House, whereof he was a Member, might not be violated or infringed in his Person.

Upon

Upon this Petition your Lordships were pleased to pronounce the following Deliverance on the 26th of *November* last : “ The Lords Justice Clerk and Commissioners of Justiciary having considered the foregoing Petition, they appoint the same to be intimated to *Robert Geddie* and Mr. *Robert Mackintosh*, the two Complainers, mentioned in the foregoing Petition, or either of them, or to their known Council or Agent, by delivering an exact Copy of the said Petition, and this Deliverance thereon, to the said Parties, Council, or Agent, and ordain them to put in their Answers thereto within forty-eight Hours after such Service, with Certification.”

In obedience to this Appointment, Answers were put in by the Prosecutors, and, upon advising Petition and Answers, and hearing Council upon the Question of Privilege, your Lordships were pleased, upon the 7th of *December* last, to pronounce an Interlocutor in the following Terms : The Lords Justice Clerk, and Commissioners of Justiciary, find, that this Court can issue no Warrant for apprehending the Person of *George Dempster*, Esq; Member of Parliament, nor for compelling him to find Bail to appear and stand Trial upon the Criminal Letters mentioned in the said Petition, during the sitting of Parliament, or within the Time of Privilege, and therefore *declare* they will adjourn the Diet of the said Criminal Letters, from time to time, during the Continuance of said Privilege.”

And, of the same Date, your Lordships pronounced another Interlocutor, in the following Terms : “ The Lords Justice Clerk, and Commissioners of Justiciary, having considered the foregoing Resolution of Court, continue the Diet at the Instance of *Robert Geddie*, and Mr. *Robert Mackintosh* Advocate, with Consent of his Majesty’s Advocate, against *George Dempster* of *Dunichen*, Esq; Advocate, till the second *Monday* of *March* next to come, and ordain Parties, Affizers, Witnesses, and all concerned, then to attend, each under the Pains of Law.”

Against these Interlocutors, and another Interlocutor of 14th *December*, not necessary to be here stated, the Prosecutors entered an Appeal to the House of Lords, and, upon the 7th of *March* last, that Right Honourable House pronounced the following Judgment :

“ Upon Report from the Lords Committees, to whom it was referred to consider, whether the Appeal, wherein *Robert Geddie* junior, Merchant, and *Robert Mackintosh*, are Appellants, and *George Dempster*, Esq; and *Christianus Adamson*, are Respondents; “ being

“ being an Appeal from two Interlocutors of the Court of Justiciary in *Scotland*, of the 7th of *December* 1767, and also another Interlocutor of the said Court of the 14th of *December* 1767, be proposed brought: It is ordered by the Lords Spiritual and Temporal in Parliament assembled, that the Petitioners do, by themselves or Agents, attend the Court of Justiciary on *Monday* next, being the Day to which the Diet is continued by their second Interlocutor, bearing Date the 7th *December* last; and, in case the Declaration in their first Interlocutor, bearing Date the same Day, should be pleaded as a Bar to the due Course of Justice, then, that the Petitioners do apply to the said Court, to reconsider whether they were authorized by the Common or Statute Law of the Land, to take Cognizance of the Subject-matter, and to make such Declaration. And it is further ordered, that the said Court be at liberty to proceed notwithstanding the said Appeal.”

The Interlocutors accordingly appeared upon the said 14th of *March* by their Council; but Mr. *Dumfries* not having then arrived in *Scotland*, your Lordships adjourned the Diet till *Friday* the 18th of the same Month.

Mr. *Dumfries* having appeared upon that Day, the Council for the Prosecutors moved the Court, that the Criminal Letters might be called, and the Trial proceed.

To this Mr. *Dumfries* answered, “ That in moving a Plea of Privilege, he had never any other Intention but that he might not be obstructed in his Attendance in Parliament, which he considered as a Duty superior to that of every other Kind; that this Reason had now failed, and therefore, although it was his Opinion, and he could plead, that Privilege of Parliament extended to every Case, except Treason, Felony, and Breach of the Peace, still he did not desire to rest upon any such Defence, but was willing to go to Trial, in such Time as the Court should direct, having due Consideration to the Convenience of all Parties concerned.”

Upon this your Lordships pronounced the following Interlocutor: “ The Lord Justice Clerk, and Lords Commissioners of Justiciary, have considered their Interlocutor of the 7th of *December* last, with the Judgment of the House of Peers of the 7th of *March* current: and what is before requested, in respect the Defender does not insist on his Plea of Privilege, as sustained by

“ said

“ said Interlocutor, find there is no Place in this Case to reconsider the Ground of the said Interlocutor; but, in respect of the said Judgment of the House of Peers, they declare that the said Interlocutor shall be no Precedent to any future Case of the like Nature, and that the Matter shall be open to the Consideration of the Court upon any such future Case, in the same Manner as if the said Interlocutor had not past.”

The Criminal Letters were then read, and Mr. *Dempster* having denied the Charge therein contained, his Council represented, that “ as neither Mr. *Robert Mackintosh*, nor Mr. *Geddie*, the private Prosecutors, were present in Court, nor any Certificate nor legal Evidence given of their being unable, by Indisposition, to attend, the Diet ought to be deserted, the Pannel being precluded from their Oaths of Calumny, which he had a just Title to demand in this Prosecution; and that 18th *December* 1727, the Diet was deserted on the same Objection against *Campbell* and *Ewing*, then private Prosecutors.”

To this it was answered, that the Objection ought to have been moved *in initio litis*; that it was understood that the Trial was not to proceed at that Diet, and that, against next Diet, if the Pannel pleased, he might have the Prosecutors Oath of Calumny; upon which another Interlocutor was pronounced in the following Terms: “ The Lords Justice Clerk, and Commissioners of Justiciary, continue the Diet at the Instance of *Robert Mackintosh*, Esq; and *Robert Geddie*, with Concourse of his Majesty’s Advocate, against *George Dempster*, Esq; till *Monday* next, at Twelve o’Clock at Noon, in this Place, and ordain the Prosecutors then to attend personally in Court, and the Pannel, Witnesses, and Affizers, then to attend, each under the Pains of Law.”

The Court having met upon *Monday* the 21st, in terms of the above Adjournment, Mr. *Geddie* appeared, and offered his Oath of Calumny; but it was again moved upon the Part of Mr. *Dempster*, that as Mr. *Mackintosh* had not appeared, the Diet, in so far as respected him, ought to be deserted; but the Reasons of Mr. *Mackintosh*’s Absence having been set forth in a Petition, your Lordships pronounced the following Interlocutor: “ The Lords Justice Clerk, and Commissioners of Justiciary, having considered the foregoing Petition, and the Motion made for the Pannel, find there is sufficient Reason given to excuse Mr. *Mackintosh*’s Absence at this Diet, and therefore find the Trial may now proceed;

“ but ordain Mr. *Macintosh* to appear personally in Court at the
 “ next Diet, to which this Trial shall be adjourned.”

Council were then heard upon the Competency and Relevancy of the Criminal Letters, upon which another Interlocutor was pronounced, of the same Date, in the following Terms : “ Parties Procurators being heard at great Length, the Lords Justice Clerk, “ and Lords Commissioners of Justiciary, ordain both Parties to “ give in to the Clerk of Court Informations upon the Debate, the “ Prosecutors to give in theirs against the second Day of *May* next “ to come, and the Pannel to give in his against the second Day “ of *June* next to come ; continue the Diet against the Pannel till “ that Time, and ordain Parties, Assizers, Witnesses, and all concerned, then to attend, each under the Pains of Law.”

In obedience to this Appointment, the present Information is humbly offered upon the Part of the Prosecutors.

Before considering the Arguments which were maintained upon the Part of the Pannel, against the Competency and Relevancy of the Criminal Letters, it will not be improper to state shortly to your Lordships the Substance and general Import of these Letters.

The Major Proposition is expressed in the following Words :
 “ That whereas, by the Laws of this Realm, every Act of Bribery
 “ and Corruption, and particularly, by the Laws and Constitution
 “ of this Realm, all corrupt and illegal Practices in the Election
 “ of Members to serve in Parliament, or to influence, procure,
 “ or bring about the same, or in any other Election, whereby the
 “ Election of a Member to Parliament may be influenced, pro-
 “ cured, or brought about in a corrupt Manner, and by Means of
 “ Bribery and Corruption, or the corrupting, or attempting to
 “ corrupt, directly or indirectly, by any Gift or Reward, or by
 “ any Promise, Agreement, or Security for any Gift or Reward, or
 “ by any Offer of Money, either in Specie, or in Bank-notes or
 “ Bills, or of any other good Deeds, any Person or Persons, to
 “ give his or their Vote or Votes, or to forbear to give his or
 “ their Vote or Votes in any Election of a Member to serve in
 “ Parliament, for any Burgh, or District of Burghs, or in any
 “ Election of a Delegate or Commissioner from any Burgh, to
 “ choose a Member of Parliament for the District to which it be-
 “ longs, or in the Election of publick Officers and Ministers of
 “ the Law, Magistrates and Rulers, who are intrusted with the
 “ Administration

“ Administration of Justice, and vested with Power, Authority, Jurisdiction, and Government over their Fellow-subjects, especially Magistrates and Counsellors of any Royal Burgh; which Magistrates and Counsellors, beside their other legal Powers, Authority and Jurisdiction, by Law are intitled to vote in the Election of the Delegate or Commissioner for the Burgh, for chusing the Member to Parliament, who represents the Burgh, ARE Crimes of a heinous Nature, and severely punishable, the more especially, when such Acts of Bribery and Corruption, or Attempts to bribe and corrupt, are practised and committed by a Member of Parliament, whose Duty it is, in a particular Manner, to discourage and discountenance all such illegal Practices.”

The Minor Proposition, in which the particular Facts offered to be proved are contained, sets forth, that the said *George Dempster*, Esq; after declaring himself a Candidate to represent the District, of which the Burgh of *Coupar in Fife* is one, in the next Parliament of *Great Britain*, “ did, by himself, or by others employed by him, corrupt, or attempt to corrupt, by Gifts or Rewards, or by Promises, Agreements, or Securities, for Gifts or Rewards, a Number of the Members of the Town-council of the said Burgh of *Coupar in Fife*, elected at the annual *Michaelmas* Election in the Year of our Lord 1766, who were the Electors, or had a Voice in the Nomination and Election of the Counsellors and Magistrates for the present Year, from *Michaelmas* 1767 to *Michaelmas* 1768, and of the Deacons of Trade in the said Burgh, elected at the last annual Election, who thereby came to have a Voice in the Election of the Magistrates for the present Year, to elect or appoint particular Persons into the Offices of Magistrates and Counsellors of the said Burgh of *Coupar in Fife*, for the present Year, or to elect or appoint into the said Offices such Persons as he desired, or were, or as he thought, were, devoted to his Interest, or would serve his Views, and not to name or appoint particular Persons, because they were not, or he thought they were not, devoted to his Interest, and would not serve his Views; and also, by the like unconstitutional Means, corrupted, or attempted to corrupt, several of the Persons who he imagined would be named Counsellors for the present Year, to give their Votes for the same Set of Magistrates; and likewise, by the same Gifts, or Rewards, or Promises, Agreements, or Securities, for Gifts or Rewards, did corrupt, or endeavour to corrupt,

“ Numbers

"Numbers of the Members of the Council for the present Year, to give him their Interest in the Choice of the Commissioner or Delegate to be appointed by the said Burgh of *Chapel in Fife*, for the electing a Member of Parliament for the said District, in any Election that might occur during their Continuance in Council." It then proceeds more particularly to mention a Number of different Persons alledged to have been corrupted, or to have been attempted to be corrupted, by Mr. *Dempster*, or other Persons employed by him, for the Purposes aforesaid; and mentions a Number of particular Circumstances relative to some of the Persons so named; after which it concludes with the following Words: "At least, the said *George Dempster* above complained upon, is guilty, Actor, Art and Part of the Crimes of Bribery and Corruption before mentioned, or of Attempts to bribe and corrupt, and of the illegal and corrupt Practices before mentioned, for the Ends and Purposes before written."

Such being the Nature of the Major and Minor Propositions, the Criminal Letters conclude as follows: "All which Facts, or Part thereof, or that he, the said *George Dempster*, is Art and Part of all, or one or other of the foresaid Crimes, being found proven by the Verdict of an Assize, before our Lords Justice General, Justice-Clerk, and Commissioners of Justiciary, in a Court of Justiciary to be held by them, within the Criminal Court-house of *Edinburgh*, upon the 7th Day of *December* next to come, he, the said *George Dempster*, ought to be punished with the Pains of Law, to the Example and Terror of others to commit the like in Time coming."

The above general Account of the Criminal Letters being premised, the Prosecutors now proceed to consider the several Defences that were maintained upon the Part of the Pannel at the Pleading.

The *first* of those Defences was, that the Libel was not competent, in respect it was not laid upon any particular Statute, but upon the Common Law, and that the Crime of Bribery was unknown in the Common Law of this Country: And, in Support of the last Branch of this Defence, Reference was made to Sir *George Mackenzie's* *Criminals*, p. 174, where he mentions several Crimes punished amongst the *Romans*, which he supposes not to be directly in use in this Country; and the Prosecutors were called upon to produce one Instance of a Trial brought before the Court for this Crime.

But

But, in answer to this, it may be, in the *first place*, observed, That as several Statutes have passed, inflicting particular Penalties and Punishments upon those who are guilty of Corruption in Matters of Election, the Libel must be competent, in so far as it is applicable to these Statutes.

It was indeed maintained, upon the part of the Pannel, that no Indictment can be laid upon a Statute, without libelling the Statute itself; but this is a Doctrine to which the Prosecutors can by no means assent. Statutes are Part of the Law of the Realm; and, of consequence, a Libel that charges a certain Act or Deed to be a Crime by the Laws of the Realm, must be competent, whether such Act or Deed is understood to be of a criminal Nature by the Common Law, established by a Tract of Decisions, and inveterate Consuetude, or by a particular Statute, inflicting a particular Punishment.

To illustrate this Position seems altogether unnecessary. Many Acts of Parliament have passed with regard to the Crime of Theft, but few or no Indictments are to be met with that libel any of these Acts. It is sufficient that they mention the Act of Theft to be a Crime by the Laws of the Realm in general. Many other similar Instances might be pointed out, were it necessary: But it will be sufficient to observe, that the Doctrine here pleaded for the Pannel must resolve into this absurd Proposition, That an Act or Deed, which tends, if not to the immediate Subversion, at least to the imminent Danger of the Constitution, and against which severe Sanctions and Penalties have been enacted by Statute, is not a Crime by the Laws of the Realm.

There is indeed one Distinction betwixt Libels which are laid upon the Laws of the Realm in general, and those which are expressly laid upon particular Statutes, inflicting particular Punishments; but this Distinction affects not the Competency of the Libel, but the Power and Discretion of the Judges. The peculiar Situation of the Kingdom, at a particular Occasion, may render it necessary for the Legislature to enact a severer Punishment upon those who are guilty of particular Transgressions, than what such Transgressions were formerly understood to merit, or was imposed upon them by the more antient Law. In such Cases, a Libel may be laid either upon the Laws of the Realm in general, or upon the particular Statute, inflicting the severe Punishment. If it be laid on the Statute, the Judges will be bound to inflict that Punish-

ment which the Statute enacts. But if it be laid in general Terms, they are not bound to exert any further Severity than what was understood to be the proper Punishment before such Statute was enacted. This is a just Distinction, founded in Reason and Humanity ; but, to suppose that the Libel is not competent, because it does not recite a particular Statute, inflicting a particular Punishment, seems to be not a little absurd.

In the *next place*, the Prosecutors, with Submission, apprehend, that the Facts charged in the criminal Letters, constitute a Crime by the Common Law of this Country, independent of the particular Statutes that have lately been enacted.

The Council for the Pannel were anxious to confine the Idea of the Word *Common Law* within very narrow Bounds, as if nothing was to be thereby understood, but the Custom and Practice of the Country, established by Judgments of the supreme Courts ; and, because no Instances were given, upon the part of the Prosecutors, of Trials of this kind from the Books of Adjournal, they hastily concluded, that Bribing was not a Crime at Common Law.

But this Argument proves too much. There are many Crimes known in the Law of this Country, and to which severe Punishments are annexed, that are not mentioned in any Statute whatever. They have indeed been frequently the Subject of Trials, and the Persons guilty of them have been condemned. But, how came the first Person that was tried for such Crimes to be condemned ? No Statute could be urged against him ; and, if the Pannel's Doctrine be true, it was equally impossible to alledge, that the Transgression laid to his Charge was a Crime at Common Law, which, according to his Argument, supposes a Course of Judgments in the criminal Court, as the only *succedaneum*, in Cases where there is no positive Statute.

But further, the Prosecutors apprehend themselves to be well intitled to maintain that the Facts charged in the present Libel are criminal by the Common Law of this Realm, in respect that Bribery was a Crime by the Law of the *Romans*, which in several Acts of Parliament is admitted to be the Common Law of the Kingdom, and which, according to the Writers of this Country, both Lawyers and Historians, is acknowledged to be our Rule, where our own Statutes and Customs are silent or deficient. See *Stun's* Annotations upon *Regiam Majestatem*, l. 1. c. 7. ver. 2.—

Craig,

Craig, 1. 1. Dieg. 2.—*Leslie*, 1. 1. cap. leg. Scot.—*Boet*. 1. 5. hist.—*Camer. de Scot. doct.* 1. 2. cap. 4.—Nor will the Passage quoted from Sir *George Mackenzie's* Criminals avail the Pannel; for tho' he ranks the *crimen ambitus* amongst those which are not directly in use with us, which was extremely natural, considering how little it was practised in his Days, yet, in the latter Part of his Observations, he plainly shows it to be his Opinion that it was punishable in this Country as well as amongst the *Romans*.—His Words are: “ And since Commissioners for Parliaments, and Magistrates of Towns are still elected by Plurality of Suffrages, I see not why such as bribe the Electors may not be liable to the same Accusation. The Punishment of this Crime was Deportation, which was much like our Banishment. And in the lesser Towns it was punished by a Fine of a hundred Crowns, and Infamy. And since it is a Kind of bribing, I think it should be punished with us as such.”

That Bribery in Matters of Election was a Crime prior to the Statutes which have been particularly directed to the Prevention of it, is likewise clear from the Preamble of the Act of *George II.* which begins with the following Words: “ Whereas it is found by Experience, that the Laws already in being have not been sufficient to prevent corrupt and illegal Practices in the Election of Members to serve in Parliament, &c.—These Words plainly shew that this Statute was by no means creative of a new Crime, formerly unknown in the Law; and that, on the contrary, it was only enacted to give a new Remedy, by inferring certain Penalties and Disqualifications, and making it in Effect the Object of a Civil Action to any common Informer.

The Council for the Pannel endeavoured likewise to support this Plea of Incompetency by Analogy. They observed, that no Prosecution lies at Common Law against Usurers or Smugglers, although such Persons may, with the strictest Propriety be considered as guilty of criminal Acts.

But, with respect to Usurers, the Council for the Pannel seem to have altogether misapprehended the Law. It appears indeed, that by our old Law, Usury could not have been made the Foundation of a Prosecution during the Usurer's Life; but, in case he repented not before his Death, his whole moveable Goods and Chattels were forfeited to the King, and his Heirs were likewise deprived of his Heritage, as appears from the *Regiam Majestatem*, l. 2. cap.

cap. 54.—Besides, the Statute of *James VI.* Parl. 11. cap. 52. which is the first Act of Parliament made against Usurers, appoints them to be punished conform to the Laws of the Realm, which shews that at that Time it was understood to be a Crime at Common Law.

Nor can the Pannel avail himself in the smallest Degree, of the Declaration made by the Justices, in the Case of *Hugh Roxburgh*, as stated by Sir *George Mackenzie*, in his Title of *Usury*, because, in that Case, the Question was not, Whether Usury was punishable as a Crime, but only, whether the taking more Interest than *6l. per cent.* could infer Usury, as the Act 1649. by which Interest was reduced to so low a Rate, was rescinded after the Restoration.

Again, with regard to Smuggling, the Prosecutors can, by no means, agree, that it is not an Offence, even at Common Law, and, as such, the proper Subject of a criminal Prosecution, though no Case may hitherto have occurred, where it was thought expedient to bring such Offenders to Trial, otherways than by Prosecutions upon the Revenue-statutes, for Recovery of the Forfeitures and Penalties thereby inflicted; it is a Species of Theft, whereby the Crown is defrauded of its just Rights, by the criminal Act of the Person guilty; and therefore, as every other Offence of that Nature committed against the Statute Law of this Country, and whereby third Parties suffer Damage, might be criminally prosecuted; but, be that as it will, no Argument can from thence proceed by Analogy to the Case in hand.

Bribery, in Matters of Election, is a Transgression of a very different Nature, tending not only to corrupt the Morals of the People in general, but likewise dangerous in the highest Degree to the Constitution itself: for, as is well said by an eminent Writer on the Criminal Law of *England*: “ Nothing can be more palpably prejudicial to the Good of the Publick, than to have Places of the highest Concernment, on the due Execution whereof the Happiness of both King and People doth depend, disposed of, not to these who are most able to execute them, but to those who are most able to pay for them; nor, can any thing be a greater Discouragement to Industry and Virtue, than to see these Places of Trust and Honour, which ought to be the Rewards of these, who by their Industry and Diligence, have qualified themselves for them, conferred on such, who have no other Recommendation, but that of being the highest Bidder; neither can any
“ thing

" thing be a greater Temptation to Officers to abuse their Power
 " by Bribery and Extortion, and other Acts of Injustice, than the
 " Consideration of the great Expence they were at in gaining
 " their Places, and the Necessity of some times straining a Point,
 " to make their Bargain answer their Expectation."

It was further argued upon the Part of the Pannel, That, as the Statute of the second of the late King, imposing Penalties and Disqualifications upon those, who should be guilty of Corruption in the Election of a Member of Parliament, was extended by the Act of the 16th of his late Majesty, to the Election of Commissioners from Burghs, it from thence appears, that Bribery, in the Election of Magistrates and Counsellors, was, *ex proposito*, omitted, and that, on that account, the Criminal Letters are altogether incompetent, in so far as they charge the Pannel to have been guilty of Bribery, in order to influence the last *Michaelmas* Election.

But to this an obvious Answer occurs, *viz.* that the Criminal Letters are not laid upon these Statutes in particular, but upon the Laws of the Realm in general; and, if Bribery in the Election of a Commissioner or Delegate from a Burgh, is a Crime at Common Law, every Act of Bribery committed with the same View must be equally criminal; and it is particularly charged in the present Case, that the Bribery committed at the annual *Michaelmas* Election, was done, with the view of securing to the Pannel a Majority of Votes in the Election of a Commissioner or Delegate to be chosen by the Burgh. How far the Objection might go, had the Criminal Letters been laid upon the Statutes only, it is not *hujus loci* to enquire.

The next Defence stated for the Pannel was, that, by the established Practice of the Criminal Court, every Prosecution must be brought, either at the Instance of his Majesty's Advocate, or in the name of a private Party having Interest, but that the present Prosecution was brought by private Parties, who qualify no Interest, and who conclude merely *ad vindictam publicam*.

The Council for the Pannel seemed to lay their chief Stress upon this Plea, and spoke to it at great Length; they observed, that, even in Republicks, the bad Consequences arising from admitting popular Actions were very soon discovered; that, in order to prevent these Consequences, an Oath of Calumny was first invented; and that not being sufficient, the *subscriptio in crimen*, by which

the Prosecutor bound himself to suffer the Punishment of the Law, in the Event of his failing to convict the Pannel, was found necessary to put a Stop to wanton and vexatious Actions ; that this last Remedy, however, came not only to be a complete Bar to false Accusations, but likewise a total Prohibition of Prosecutions at the Instance of private Persons, no Man being willing to venture his Life and Fortune in bringing to Punishment a Criminal who had done him no personal Injury, however beneficial it might be to the State to have the Criminal destroyed ; and therefore, in all modern Governments, it was an established System to reject popular Actions ; that, in *England*, though every Man may present a Bill to a Grand Jury, yet that Jury must find the Bill true, before a Person accused of a Crime can be brought to a Petty Jury ; and that no Information can be filed, in Matters criminal, but by the Attorney General, *ex officio*, or upon Leave given by the Court ; that, in this Part of the united Kingdom, the King's Advocate stands in place of the Grand Jury ; and that, although he cannot refuse his Concurrence to a Party having Interest to prosecute, no Example can be given of a private Prosecution having been sustained in this Court, except where an Interest, either in Property, Person, or Character has occurred ; that the sustaining the Titles of the present Prosecutors, would be allowing a Precedent for these popular Actions, which the Laws and Constitution of this Kingdom have so wisely endeavoured to restrain, and that the Criminal Court, in that Event, would be harassed with an infinity of wanton and groundless Prosecutions.

In answer to this, the Prosecutors will readily admit the superior Wisdom of modern Governments, in appointing a *calumniator publicus*, for the Prosecution of publick Crimes, and in restraining those who can qualify no Interest, more than any other Individual, from maintaining criminal Prosecutions ; but, at the same time, they apprehend, that it would be of equally dangerous Consequence, to confine what is called an Interest within too narrow Limits, especially in Crimes which have an immediate Tendency to affect the Well-Being of the Constitution ; and it will appear, upon Reflection, that the Doctrine laid down by the Pannel's Council goes too far.

It will not be denied that a Son, or any other near Relation, is entitled to prosecute, in his own Name, for Murder, yet it cannot be said, that such Prosecutor is hurt either in his Person, Goods, or

or Character, and the Criminal Prosecution can go no further than to obtain publick Vengeance ; it is true, indeed, that he is connected by Family with the Person murdered, and therefore a new Interest appears ; and, of consequence, it would seem to follow, that every Person who can show that he has a Connexion with the Subject of the Prosecution, which the Lieges, in general, have not, must have an Interest to maintain the Action in his own Name, without the Instance of his Majesty's Advocate.

To apply this Principle to the present Case, it will only be necessary to consider the Character in which the Prosecutors appear on the Face of the Criminal Letters.

Mr. *Geddie* was a Baillie in the Burgh, at the very Time of the Transgressions which are the Subject of the present Prosecution ; he falls therefore to be considered as one of the Guardians and Protectors of the Freedom and Independency of the Burgh ; it was his Duty to maintain them by every lawful Means, and it was equally his Duty to take every Measure that might have the Effect to prevent, in Time coming, an Attack upon the Purity or Chastity of the Burgh, or upon the Morals of its Inhabitants. But no other Method could be so effectual for that Purpose as a Criminal Prosecution of this Kind. The wisest Laws are of no Significance, unless they are carried into Execution, whereas one Example of publick Justice upon the Transgressors of these Laws may be the Means of rendering a second Exertion of them altogether unnecessary.

Let it be supposed, that the *Michaelmas* Election of Magistrates and Counsellors had been overawed by Force, and that thereby Mr. *Dempster* had been able to introduce such a Set of Magistrates and Counsellors as would secure to him a Majority of Votes in the Election of a Delegate to be chosen by the Burgh ; would it not, in that Event, have been competent to Mr. *Geddie*, as one of the chief Magistrates of the Place, to have maintained a Criminal Prosecution against those who had used the Force ? It is humbly thought, that such Prosecution would have been perfectly competent ; and, if so, it is difficult to conceive why it should not be equally competent to him to prosecute those who have been guilty of Bribery for the like Purposes.

Again, with regard to Mr. *Mackintosh*, he had declared himself a Candidate for being chosen to serve as Member of Parliament for the

the District, before any of the Acts of Bribery libelled had been committed, and was chosen a Guild-counsellor of the Burgh of *Cupar in Fife* at the last *Michaelmas* Election, and put upon the Leet for the Office of Provost, unless therefore he can be allowed to have an Interest, it is absolutely impossible to figure an Interest that any private Party can have to prosecute for a Crime of this Nature; the Bribery was directly levelled at him, and was practised with no other View than to overturn the Interest he had established in the Burgh, and to secure to the Pannel a Majority of Voices in the Election of the Delegate.

It was indeed observed, that the Loss which Mr. *Mackintosh* has suffered, may be repaired by the Civil Action depending before the Court of Session; but that is a Matter of no Consequence to the present Question; a Person, whose Goods have been stole, may sue for Restitution before the Civil Court; nay, he may vindicate them from a third Party; but, this notwithstanding, he will be intitled to maintain a criminal Prosecution against the Thief, *ad vindictam publicam*.

The Prosecutors will beg leave to mention an Example of a criminal Prosecution, sustained at the Instance of a private Party, where his Interest was much more remote than theirs, *viz.* the Case of Mr. *Lockhart of Lee*, who maintained a criminal Action at his own Instance, against certain Persons who had been guilty of Riots in the Town of *Lanerk*, in opposition to the Settlement of a Reverend Gentleman, to whom, as Patron of the Parish, he had given a Presentation. It cannot be said, that Mr. *Lockhart* was by these Riots hurt, either in his Person, Goods, Family, or Character; yet, this notwithstanding, his Connexion with the Cause of the Riots, was deemed a sufficient Interest to intitle him to maintain the Suit, and several of the Pannels were found guilty, and condemned.

Nor will the allowing Persons to prosecute, who have such an Interest as the present Prosecutors, ever be attended with any bad Consequences. The Concurrence of his Majesty's Advocate is absolutely required; and although few Instances may be found, where it has been necessary for him to refuse that Concurrence, yet, if he is satisfied, and can show that there is no Foundation for a Prosecution, he must certainly be intitled to with-hold it; it is made necessary, in order to give a Check to private Parties, whose Re-
 tainment may sometimes carry them beyond proper Bounds. It is
 therefore

therefore absurd to suppose, that he is obliged to grant it in every Case. On the other hand, the Prosecutors will be allowed to say, that if the Objection made to their Title shall be sustained, no Prosecution of this Kind may probably ever take place: Transgressions of this Nature, however prejudicial to the Constitution, are become too common to be viewed by the Generality of the People in that Light in which they ought to appear; and perhaps a publick Officer might be thought rather too rigorous, were he, of his own Accord, to apply to the Criminal Courts against the Offenders, who are generally Men of Rank and Fortune, and who, were it not for their Error in overlooking the Consequences, and bad Tendency of their Misconduct in that Particular, would be most worthy of the publick Esteem; and the Prosecutors will be allowed to think, that, on that account, it would be more expedient to sustain the Title of those who are immediately affected with the Consequences of the Bribery, and who are connected as Magistrates and Counsellors with the Burgh where it has been practised, than to find that they have no Interest to prosecute.

It was observed by one of the Council for the Pannel, that Sir *John Gordon* had admitted his having no Interest to prosecute as a private Party, when he insisted, that the Lord Advocate should, at his own Instance, prosecute a Gentleman upon the Common Law, who was accused of having been guilty of Corruption in a Northern Burgh; but Sir *John Gordon* was no Magistrate or Counsellor of that Burgh, nor had he any Connexion with it; he was only *quilibet ex populo*, and as those, in whose Name the Civil Prosecution had been carried on, were unwilling to become Prosecutors in a Criminal Action, he had no other Method left but by applying to the publick Prosecutor to take up the Cudgels for the publick Interest.

The only other Defence pleaded upon the Part of the Pannel was, that the Libel, so far as it subsumed that he had attempted to corrupt, or attempted to procure, and made Offers which were not accepted of, was clearly not relevant.

The Prosecutors will readily agree, that a mere Intention to commit a Crime, where no overt Act is done, with a view to carry it into Execution, is not the Subject of Punishment. It is indeed impossible to prove such Intention, and even though it were capable of Proof, it ought to be presumed, that he who had done nothing to carry it into Execution, had immediately repented of it: But

the Case is very different, where not only an Intention is conceived in the Mind, but likewise an Attempt made to execute that Intention. In that Case there is no Room for the Presumption of Repentance, and Punishment ought to be inflicted, though, no doubt, the Measure thereof ought greatly to depend upon the Nature and Mode of the Attempt.

That this was the Doctrine of the Roman Law, there cannot be a Doubt. Many Texts might be quoted in proof of it, but two or three only shall be mentioned. In L. 1. Pr. ff. De extraord. crim. it is said, "Solicitatores alienarum nuptiarum, itemque matrimoniorum interpellatores, etsi effectu sceleris potiri non possunt, propter voluntatem perniciosæ libidinis extra ordinem puniuntur."—And, in § 2d of the same Law, "Qui puero stuprum, abducto ab eo vel corrupto comite, persuaserit, aut mulierem puellamve interpellaverit, quidve impudicitix gratia fecerit, donum præbuerit, pretiumve, quo iis persuadeat, dederit, perfecto flagitio, puniuntur capite imperfecto, in insulam deportantur corrupti comites, summo supplicio adficiuntur."

The *Lex Cornelia de sicariis*, likewise not only punished those who were guilty of actual Murder, but also those "qui homines occidendi furtive faciendi causa cum telo ambulaverint. L. 1. *Ad Leg. Cornel. de sic. et Venefic.*" Or, "Qui venenum necandi hominis causa fecerint, vel vendiderint, vel habuerint."

The different Degrees of Punishment, to be inflicted on those who attempted to commit Crimes, are accurately laid down by *Puffendorf*, in his *Treatise De Jure Naturæ et Gentium*, Lib. 8. Cap. 3. § 18. "Circa singula horum delictorum primum locum obtinent delicta consummata; postremum, quæ ad actus aliquos, non tamen ultimum, processerunt, in quibus tanto quodque est gravius, quo ulterius processit. Ubi observandum naturaliter propositum et desiderium facinus aliquod patrandi, haudquaquam pari gravitate cum ipso facinore perfecto censeri posse; quippe cum longe atrocior sese mali facies animo repræsentat. Quando igitur aliquando voluntas facto æquipollere dicitur, id intelligendum est de illa voluntate quæ cum extremo conatu conjuncta est. Sic ut inter hanc, et eventum facinoris, nulla nova voluntatis operatio locum habuerit, etsi successus destinatus desecent."

The same Doctrine is laid down by Sir George Mackenzie, in his *Treatise of Criminals*, Tit. 1. § 4. "It is likewise much debated,

"bated, whether an Endeavour to commit a Crime be a Crime,
 "albeit the Effect follow not, and albeit it be a Rule in the Civil
 "Law, that, *in maleficiis voluntas spectatur, non exitus*, L. 1.
 "§ 14. *Divus. ff. ad leg. Corn. de fizar.* yet it is generally con-
 "cluded, by the Practicians of all Nations, that *simplex conatus*,
 "or Endeavour, is not now punishable by Death, *Clar. Quest 91.*
 "*Gothofr. § . Conatus.* But, for clearing this according to the
 "Principles of Reason, I shall form these Conclusions: *first*, That
 "all Endeavour is an Offence against the Commonwealth, though
 "nothing follow thereupon; albeit sometimes the Punishment be
 "connived at, or mitigated, according to the several Degrees of
 "Malice; but that it is in itself criminal, appears from this,
 "that simple Design is punishable in Treason, and some other a-
 "trocious Crimes, because in these, especially in Treason, it
 "would be too late to provide a Remedy when the Crime is com-
 "mitted. *Second*, In less atrocious Crimes the Design is punished,
 "if the Committer proceeded to act that which approached nearly
 "to the Crime itself, *si deventum sit ad actum maleficio proximum.*
 "—But this is not *simplex conatus*, but, in Effect, is a lesser De-
 "gree of the Crime to which it approaches; as if a Thief have
 "put Ladders to the House which he resolved to rob; or, if he
 "mix Poison, but the Potion be spilt upon the Ground by an Ac-
 "cident: And albeit it be commonly received, that, even in these
 "Cases, *affectus non est puniendus sine effectu*, by the same Punishment,
 "with the Crime designed, yet I would distinguish in this be-
 "twixt an Effect disappointed by an interveining Accident, and
 "that which is stopt by the Repentence of the Committer; for,
 "where the Design was only disappointed, I think the ordinary
 "Punishments should not be remitted, in Cases, *ubi deventum est*
 "*ad actum proximum.*"

After what has been said, it will require few Words to show,
 that he who attempts to corrupt, by Offers, or Promises of Money
 or Rewards, is equally guilty, whether these Offers or Promises are
 accepted or not. He has done every thing upon his part to the
 Completion of the Crime; and he ought not to be allowed to
 avail himself of the Virtue of those to whom the Offers or Promises
 were made.

The Crime, most similar to that which is the Subject of the pre-
 sent Prosecution, is the bribing of Judges; and the same Author,
 who was last appealed to, lays it down as an established Rule, that the

the

the Attempt, *ubi pervenit ad actum proximum*, is equally punishable as if it had taken Effect. "He also who corrupts the Judges is punishable with the Punishment of Falshood. *Gloss. ad Leg. qui explicandi, C. de Accus.* which holds, though the Judge accept not the Bribe; he is punishable if he endeavours, *pervenit ad actum proximum. Mensch. de Arb. Cas. 343.*" Mackenzie's *Criminals*, Lib. 1. Tit. 25. § 3.

The Prosecutors having thus considered the whole of the Defences that were stated upon the part of the Pannel at the Pleading, they will detain your Lordships no longer. They are hopeful, that they have sufficiently answered each of these Defences, and that the Court will have no Difficulty of finding the Libel relevant and competent at their Instance, and remitting the Pannel to the Knowledge of an Assize.

In respect whereof, &c.

ALEX. WIGHT.

N^o 4th
JULY 8. 1767.

Unto the Right Honourable, the Lords of Council and Session,

T H E
P E T I T I O N
O F

DAVID THREIPLAND-SINCLAIR of *Southdun*, and STEWART THREIPLAND of *Fingask*, his Administrator in law ;

HUMBLY SHEWETH,

THAT *David Sinclair* of *Southdun* was thrice married ;
in 1714, he married Lady *Janet Sinclair*, sister of *Alexander Earl of Caithness*.

In 1722, he married Mrs. *Marjory Dunbar*, daughter of Sir *Robert Dunbar* of *Northfield*. And,

In 1756, he married Mrs. *Margaret Murray*, daughter of *James Murray* of *Clarden*.

He left issue of all his wives.

By Lady *Janet Sinclair*, his first wife, who died in 1720, besides two children who died infants, he had two daughters, *Jean* and *Janet*, both now deceased. 1st Marriage.

Jean, the eldest, in 1746, married Sir *William Dunbar* of *Westfield*: She died 1749, leaving an infant daughter, who also died 1750.

Janet, the second, in 1753, married *Stewart Threipland* of *Fingask*, and died 1755, leaving two children, *David* the petitioner, and a daughter, *Janet*.

By Mrs. *Marjory Dunbar*, his second wife, who died in 1755, he had two daughters, *Marjory* and *Katharine*. 2d Marriage.

Marjory,

Marjory, the eldest, in 1748, married John Dunbar, son of Sir Patrick Dunbar of Northfield, by whom she had no issue: He dying, in 1751 she married James Sinclair of Harpsdale, by whom she had a son, George-Marjory Sinclair, and four daughters.—She herself died in 1763, and her son died in 1766.

Katharine, the other daughter, is alive and unmarried.

3d Mar-
riage.

By Mrs. Margaret Murray, his third wife, Southdun had an only daughter, Margaret, born in 1758.

Southdun died in March 1760, leaving the said Mrs. Margaret Murray a widow, who is still alive, and now married to Mr. John Gibson Sheriff substitute of Caithness.

These different marriages, of course, gave rise to different settlements.

On occasion of his marriage with Mrs. Marjory Dunbar, his second wife, Southdun entered into a contract of marriage, whereby he became bound to invest her in liferent lands worth 50 merks of free yearly rent, and to provide the children of the marriage in the sum of 10,000 merks, to be divided by the father, *with consent of their mother, and, failing thereof, by two of the nearest in kin on each of the father and mother's side*; and the contract contains a further provision, in these words: "And whatsoever lands, heritages, sums of money, or others whatsoever, it shall happen the said David Sinclair to conquest or acquire during the marriage, he binds and obliges himself to provide and secure the same in manner following, *viz.* One half to the said Mrs. Marjory Dunbar in liferent, for her liferent use alienably, during all the days of her lifetime; and that, by and attour her liferent provision above written, and the whole to the children in fee, to be divided among them in manner above mentioned: Declaring, *That nothing shall be habit and repute conquest, but what he shall be worth at the dissolution of the marriage beyond his present land estate, and after payment of all his just and lawful debts already contracted, or to be contracted by him during the marriage.*" The contract provides also, that the moveables shall be divided according to law.

Mrs. Marjory Sinclair, Southdun's eldest daughter of this marriage, having intermarried with her cousin-german, Mr. John Dunbar, son of said Sir Patrick Dunbar of Northfield; by contract of marriage, of this date, Southdun became obliged to pay to said Sir Patrick Dunbar the sum of 10,000 merks, in name of to-
cher

Feb. 24.

1748.

cher with his daughter, and as her share of the conquest, and which the lady and her husband accepted of, and was paid accordingly.

Mr. *John Dunbar* having died soon after the marriage, Mrs. *Marjory* was again married in September 1751 to the said *James Sinclair* of *Harpdale*; at which time, upon Mrs. *Marjory*'s renouncing the liferent right she was provided to in her first contract of marriage, Sir *Patrick Dunbar*, her first husband's father, repaid the 10,000 merks to her and *Harpdale*, her second husband.

Of this date, *Southdun* executed a bond of provision in favours Sept. 28. of Mrs. *Marjory* and her husband, in conjunct fee and liferent, 1757. for their liferent uses allanarly, and to their children in fee, for 8000 merks *Scots*, payable at the first term of *Whitsunday* or *Martinmas* after his decease, with interest thereafter.

This bond proceeds upon a narrative of the affection he bore to his daughter, and that the provisions made for the children to be procreate betwixt her and *Harpdale* were too mean; therefore, he thought proper to add the sum of 8000 merks to their provisions; but declares, that this sum, with the 10,000 merks he had formerly given her in name of tocher, and for her share of conquest, should be accepted in full of all she could claim as one of the two daughters or children of the marriage, betwixt him and Mrs. *Marjory Dunbar*, in consequence of her mother's contract of marriage, and of all other pretensions, except his good will allanarly, and her succession to the estate, if the same should fall to her by right of blood, or any settlement made or to be made by him.—The bond dispenses with the delivery, reserves power to alter, and was found in the defunct's repository after his death.

Of this date, *Southdun* executed a bond of provision in favour July 19. of Mrs. *Katharine Sinclair*, his other daughter by the said Mrs. 1756. *Marjory Dunbar*, whereby he became bound to pay to her, and her heirs, executors and assignees, the sum of 1000 *l. Sterling* at the first term of *Whitsunday* or *Martinmas* after his death, with interest thereafter, and, in the mean time, to aliment her in his family according to her quality, and furnish her with cloaths and other necessaries, or, in his option, to pay her 30 *l. Sterling* yearly to buy her cloaths and necessaries.

This:

This bond contains the following clause: " Declaring always, in case it is hereby expressly provided and declared, that thir presents are granted by me, and accepted of by the said *Katharine Southair*, in consideration and full satisfaction to her of her share of the provisions granted by me in the contract of marriage betwixt me and my said deceased spouse, in favours of the daughters of that marriage, failing heirs male; and in consideration and satisfaction to her of her share of the provision of conquest of lands and heritages, and others whatsoever, which should be acquired during the marriage, granted by me in favours of the daughters of said marriage, failing heirs male; and in consideration and full satisfaction of her portion natural, bairn's part of gear, share of moveables, legitim, or other pretensions whatsoever, which she, as one of the two daughters or children of the said marriage, can anyways ask, claim, or pretend to, from me, by and through the decease of her mother, or me, when the same, by the pleasure of God, shall happen: And the said *Katharine Southair*, by her acceptance hereof, declares, that thir presents are granted, and accepted of by her, in consideration and full satisfaction of the said promises, and becomes bound and obliged to discharge her said father of the said promises, and of all her other pretensions, except his own good will almsarily, and her succession to his estate, if the same falls to her by right of blood, or any settlement made or to be made by her father."

This bond reserves no power to alter, and was considered by *Southair* to have been accepted of by Miss *Kettle* and her friends. Sir *Patrick Dunbar*, her uncle, solicited *Southair* for this provision, which *Southair* accordingly granted two days before he entered into the postnuptial contract of marriage with his third wife. The bond was delivered to Sir *Patrick*, who gave it to Miss *Kettle*, and she returned it again to her uncle to keep for her father; and two months after that, viz. 15th *September* 1756, he put it in the register: and from this time forward, until *Southair's* death in 1765, Miss *Kettle* lived in family with her father, and was alimanted and furnished with cloaths, in terms of the bond.

When *Southair* married Miss *Margaret Murray* his third wife, i. e. by a postnuptial contract of marriage, executed before them, became bound to provide his whole estate in the inheritance of the

the

the marriage, with the burden of all his debts and deeds; and failing heirs male, to pay the daughters, if one, the sum of 18000 merks, and if more, the sums therein mentioned, and payable in manner therein exprest; which provision is declared to be in full satisfaction to the daughters of their legitim, bairns part of gear, share of moveables, and every other thing they can claim or pretend to, by and through his decease.

And by the contract he provides his wife, in case she should survive him, to the life-rent of certain lands therein exprest, and to some other provisions, as therein particularly mentioned; which provisions she accepted of, in full satisfaction of the life-rent provision competent to her by law, and of her share of moveables.

In consequence of this contract, *Margaret Sinclair*, the only child of the marriage, is now intitled to that provision of 18000 merks, with interest from *Whitsunday* 1760, being the first term after the father's death; and *Mrs. Margaret Murray*, the widow, is in possession of the life-rent lands provided to her, and is intitled to certain sums of money, in implement of the provisions secured to her by the contract.

It will be informed, that in 1746, *Mrs. Jean Sinclair*, *Southdun's* eldest daughter, having intermarried without her father's consent, he, of this date, executed a deed of entail, disinheriting her and her issue, whereby he provides the whole land estate he was then possit of, viz. the lands of *Southdun*, *Wester Watten*, *Bowertower*, *Brabsterdoran*, and others, all which belonged to him at the time of his second marriage, in favour of a certain series of heirs therein exprest.

May 9.
1747.

Southdun having died in *March* 1760, without issue male, the above estate devolved upon the petitioner.

From the state of *Southdun's* affairs, it can be made appear, that the debts resting by him in *August* 1755, when his second wife died, extended to above 6000 *l. sterling* of principal, besides interest, and that his debts, at his own death in *March* 1760, including the childrens provisions, were upwards of 8000 *l. sterling*, besides interest.

It also appears, that, exclusive of the old estate, which has devolved upon the petitioner, all the other subjects will be hardly sufficient to pay the defunct's debts, and the childrens provisions.

These heritable subjects, being all destined to *Southdun* and his heirs and assignies whatsoever, fell to be taken up by the petitioner and his three aunts, heirs portioners of line to the defunct, upon supposition that Mrs. *Marjory Sinclair's* contract of marriage in *February* 1748, and the bond of provision granted by *Southdun* in *July* 1756 to Mrs. *Katharine*, the other daughter of the second marriage, were available to import a discharge of their interest in the conquest provided to them in their mother's contract of marriage.

The petitioner had no expectation of any advantage from this succession, further than that the subjects be properly applied in extinction of the debts and childrens provisions, and the lands of *Southdun*, and others belonging to him, thereby relieved, agreeable to the intention of *Southdun*: But the Ladies of the second marriage, hoping to profit more by virtue of their mother's contract, than by the bonds granted by their father, served themselves heirs of provision to their father, under that contract; and in virtue thereof, apprehended the possession of the lands of *Northdun*, some houses in *Thurso*, and two wadsets on *Lathewheel* and *Ginnish*, all acquired during the subsistence of that marriage, thereby intending to carry off the greatest part of the subjects, and throw the load of the debts upon the petitioner's lands, contrary to *Southdun's* intention, either by the contract with their mother, or any of his subsequent deeds. Being sensible, however, that this attempt was dangerous, they have expelled their service *ex bono fidei inventum*.

Upon this title, *James Sinclair of Duran*, as assignee by the representatives of *Marjory Sinclair*, the eldest daughter of the second marriage, and *Katharine Sinclair* the other daughter of said marriage, has brought an action, wherein he calls the whole representatives of the deceased *David Sinclair of Southdun*, &c. his executors, his heirs of line, his heir male, and his heir of tailzie and provision — The libel sets forth the various subjects acquired by *Southdun* during the existence of the second marriage, said to be vested in the heirs of that marriage, by their service as heirs of conquest; and concludes, that the different heirs and representatives of *Southdun*, for their respective interests, should be bound and obliged to relieve the conquest subjects of the whole debts due by *Southdun* at his death.

On the other hand, an action was brought at the instance of the petitioner, for setting aside the titles made up by the pursuers in the other action, in respect they had no claim of conquest, that claim being respectively discharged by the pursuers, *viz.* by *Marjory* the eldest daughter, in her contract of marriage in the 1748, and by *Katharine*, in the bond of provision granted to her by her father, and accepted in the 1756; and therefore they could only be considered as creditors to their father, and the subjects to which they had made up title by their pretended service, could only be taken up by the petitioner, and the other issue of *Southdun*, of his second and third marriages, as heirs portioners of line to him.

These actions coming before Lord *Auchinleck* Ordinary, a litigation and debate ensued, upon the following points; *1mo*, Whether Mrs. *Marjory*, by her contract of marriage 1748, had effectually discharged the claim of conquest competent to her in virtue of her mother's contract of marriage? *2do*, Whether the bond of provision by *Southdun* in favour of his other daughter *Katharine* in 1756, did likewise import a discharge of her claim, in consideration of the 1000 *l. sterling* granted to her by that bond? and as Mrs. *Katharine* denied her acceptance of that deed, the petitioner gave in a condescendence of facts, which they craved the Lord Ordinary would ordain Mrs. *Katharine* to confess or deny, by a writing under her hand. *Lastly*, Upon supposition that the claim of the eldest daughter was discharged, but the claim of the younger not barred, it was debated betwixt the parties, Whether the claim of the younger daughter still remaining, was only for the half of the whole value of the conquest, or if the discharge granted by *Marjory* to her father, did operate in favour of the younger daughter, so as to extend her claim to the whole conquest, which remained over and above the provision granted to *Marjory* the eldest daughter?

Upon this debate, the Lord *Auchinleck* Ordinary, of this date, Feb. 11. pronounced the following interlocutor; " Having considered the ^{1767.} debate, with the several writings therein referred to, finds, " That Mrs. *Marjory* and *Katharine Sinclairs*, the pursuer's cecendants, having been the only children of the marriage between " *David Sinclair* of *Southdun* and Mrs. *Marjory Dunbar*, were intitled " to full implement of the provisions to the children of that marriage, in terms of the marriage articles between their parents,

" *viz.*

1000 merks, and the whole that should be conquest during the marriage: the conquest being declared to be what *Sachelan* should have at the dissolution of it, over and above the land estate he was then posselt of, and after payment of all debts he was then owing, or should be owing at the dissolution of the marriage: But finds, that neither of these daughters was intituled of the aforesaid provision, in respect the father, by the conception of the contract, had the power of division:—And therefore finds, That though in his daughter *Margery's* contract of marriage, he settled 10000 merks upon her, as her share of the conquest, which was effectual to cut out *Margery* and her heirs, who behaved to rest satisfied with the division he made, he still continued bound to make good the provisions to the other heir of the marriage, Mrs. *Katharine*, so far as Mrs. *Margery's* share had not exhausted them.— And before answer to the question, how far Mrs. *Katharine* was cut out from claiming her share of the provisions, appoints her to make distinct and pointed answers to the questions put to her by the defenders, contained on a paper apart, and to subscribe her answers, and return them to this process as soon as may be.

And still this interlocutor, mutual representations were offered: The pursuers represented against that part of it, which determined, that Mrs. *Margery's* contract of marriage was effectual to cut off her claim of conquest. And answers being made to this representation, the Lord Ordinary, of this date, adhered to this part of the interlocutor.

Mar. 1.
1697.

The representation on the part of the petitioners, prayed the Lord Ordinary to far to alter the judgment above recited, as to find, that Mrs. *Margery Sachelan*, the eldest daughter of *David Sachelan* in *Sachelan's* second marriage, having discharged her interest in the conquest of that marriage, the other daughter's claim can never stand beyond the half thereof, at least, to impede advising that point, till it shall appear, whether in the course of the process, it is necessary to determine the same, or not.

Answers were made to this representation: and along with these answers, Mrs. *Katharine* gave in, signed by herself, answers to the petitioners' contentions, relative to the acceptance of the dead. And upon this representation and answers, the Lord Ordinary pronounced the following interlocutor: "Hearing re-
 " signed

Mar. 1.
1697.

“fumed the confideration of the representation for *David Threip-*
 “*land*, and his adminiftrator in law, with the foregoing answers,
 “adheres to the former interlocutor, fo far as it finds the fums
 “advanced to Mrs. *Marjory*, do not preclude Mrs. *Katharine* from
 “claiming effectual implement of the obligation for conquest,
 “in fo far as not implemented: And further, having confidered
 “the condescendence for the defenders, and Mrs. *Katharine Sin-*
 “*clair*’s answers; and, more particularly, having confidered that
 “it is an agreed fact, that Mrs. *Katharine Sinclair*, at the time
 “of the alledged tranfaction, was living in family with her fa-
 “ther; that there is no deed under her hand, renouncing her
 “claim on her mother’s contract of marriage; that it is not al-
 “ledged, that she, after her father’s death, ever made any claim
 “upon this bond, or even, in her father’s life, made any claim
 “upon it; finds, that she is not bound to accept of that bond;
 “and that her claim, and the purfuer’s in her right to the con-
 “quest, in terms of her father and mother’s contract of marri-
 “age, remains effectual.”

Against this laft interlocutor, another representation was of-
 fered by the petitioners, praying the Lord Ordinary to alter his
 former interlocutors, and to find, *1mo*, That Mrs. *Marjory Sinclair*’s
 renunciation of her fhare of the conquest, muft operate a dif-
 charge of the one half, and reftrikt the fhare of Mrs. *Katharine*
 to the other half.—And, *2dly*, To find Mrs. *Katharine*’s acceptance
 of the bond of provision granted to her by *Southdun* fufficiently
 inftructed, and that therefore, the muft hold the fame in fatis-
 faction of her claim to conquest.

The Lord Ordinary having confidered this representation, June 24.
 “finds no fufficient caufe therein for altering the interlocutor, and 1767.
 “therefore adheres thereto, and refufes the defire of the represen-
 “tation.”

Of thefe interlocutors, the petitioners humbly crave a review,
 in fo far as it is determined,—*1mo*, That Mrs. *Katharine* has not
 accepted of the bond 1756, and, therefore, has not difcharged
 her claim of conquest:—And, *2do*, That by not accepting, she
 is intitled to more than the half of the conquest provided
 in her mother’s contract of marriage, *viz.* not only her own
 fhare of the fame, but likeways what remains of her fifter’s
 fhare, over and above what she had received from her father.

Before entering into particulars, the petitioners must be forgiven to regret, that the pursuers should have been advised to involve both parties in the trouble and expence of this litigation; for, with some degree of confidence, they can venture to say, it will by no means answer their expectation; and, if they shall be successful in their present plea, they will, perhaps, find, in the long run, it would have been their wisdom and their prudence, to have acquiesced in the provisions made by their father.

The pursuers are, indeed, pleased to insinuate, that they would not have met with this opposition on the part of the petitioners, if they were seriously convinced of the truth of the observation now made.

But this will not weigh with your Lordships, when you attend to the circumstances of the case now before you. It will be remembered, that altho', in *Sutherland's* contract of marriage with his second wife, 1722, he provides the conquest to the children of the marriage, yet he declares, that nothing should be habite and repaire conquest, but what he should be worth at the dissolution of the marriage, beyond the present land estate (now belonging to the petitioners) after payment of all his just and lawful debts, contracted or to be contracted during the marriage. Here your Lordships will observe, that it is not in this case, as is usual in other clauses of conquest; nor not only are the conquest subjects burdened with the debts contracted during the existence of the marriage, but they are likewise burdened with all debts contracted previous to the marriage.—It will readily occur to your Lordships, what a scene of litigation must ensue, before that matter can be exactly ascertained, or the real state of *Sutherland's* affairs, previous to the 1722, be precisely known.

But this is not all: In order to attend with any degree of precision a claim of conquest, such as the present, it would have been necessary to have established immediately upon the dissolution of the marriage, not only the amount of the conquest subjects, but likewise the debts due at the dissolution of the marriage, which, by the contract itself, were declared to be a burden upon these subjects. But as *Margaret*, the wife deceased, in her contract of marriage with *John Douglas*, has also argued her claim of conquest; and as the other daughter, *Ann Douglas*,
et c.

rine, soon after the dissolution of the marriage, accepted of the bond of provision, which her father considered as a total discharge of all further claim upon the conquest, it could never enter into his mind, during the remaining period of his life, to make any such settlement of his affairs, as to distinguish the subjects acquired, or the debts paid and contracted after the dissolution of the marriage in the 1755, from those subjects which were acquired, and those debts which were contracted previous to, or during the existence of the second marriage; and yet, your Lordships will observe, this was absolutely necessary, in order speedily or exactly to ascertain such a claim as that now made by the pursuers.

When those various particulars occurring in this case, are joined to that confusion and perplexity which occurs in every question concerning conquest, your Lordships will not be surprised the petitioners should regret being engaged in such a litigation, however satisfied and convinced they are, that the pursuers are proceeding in their calculations upon some most erroneous *data*, and will, in the long-run, be themselves convinced, that they had much better have rested content with those provisions given them by their father, and which they had given him just reason to think themselves thoroughly satisfied with.

However, as notwithstanding these considerations, your Lordships cannot prevent the pursuers from carrying on this litigation, provided the law authorizes them to do so; the petitioners shall now proceed to state to your Lordships, the grounds upon which they are advised to think, *1mo*, That Mrs. *Katharine*, as well as her sister Mrs. *Marjory*, is debarred from insisting in the claim of conquest.—And, *2do*, Altho' she were intitled to insist in it, it must be settled upon much less extensive *data* than she is pleased to assume.

Upon the *first* point, It can admit of no doubt, that *Southdun* himself, by the deed of provision 1756, understood himself as relieved of every claim of conquest; and he undoubtedly was so, provided the fact can be instructed, that Mrs. *Katharine* did accept of this deed. The petitioners, for evidence on this head, had recourse to Mrs. *Katharine* herself, and, if it can be avoided, would incline to refrain from any other evidence upon that point. The condescendence of facts which Mrs. *Katharine* was ordained to answer, and the answers themselves are hereto subjoined for the perusal of your Lordships. She sets out with complaining of
the

the absence of her counsel, and the want of advice, tho' the train of the whole clearly shows she had been very well advised. And, in her answer to the 7th query, she forgets her introduction, and objects to the question, as being *artificial* it resolved into an opinion in point of law. If any party has suffered a loss, by the distance at which those answers were given, the petitioners must consider themselves as the losers, as they must be pardoned to think, had she answered in court, her answers would have been less artfully conceived.

However, conceived as they are, the petitioners flatter themselves, your Lordships will be of opinion, this Lady has said enough to contest the acceptance of this deed. Her uncle, Sir Patrick Dunbar, was the negotiator of this transaction: he was a man of business; he had the custody of her mother's contract, and was most nearly interested in seeing to the execution of it for her behoof. The period when it was granted, is likewise particular; it was upon the third marriage of *Southam*, a time when it was most natural for the friends of the second marriage to interpose, in order to secure the interval of those concerned in the contract of marriage 1722. It was in this character Sir Patrick Dunbar interposed; and upon his solicitation with *Southam*, the bond of provision 1756 was granted; both Sir Patrick Dunbar, and this very pursuer Mr. *Sachse* of *Darum*, son-in-law of Sir Patrick Dunbar, are instrumentary witnesses to the bond, which bond was put two days before *Southam's* marriage contract with Mrs. *Margaret Marjory*; and it will be further informed, that Sir Patrick Dunbar and Mr. *Soclaire* of *Hampden*, husband to Mrs. *Margery*, are likewise witnesses to this very contract, altho' it settles upon the heir male of that marriage, those very lands which are now claimed by the pursuer as conquest, under the second contract of marriage.

All these circumstances clearly show, that the friends and relations of Mrs. *Katharine* by the mother's side, were fully satisfied with the substitution of *Robert Stirling*, by a bond of provision, in place of a vague and indefinite claim of conquest, under the contract of marriage 1722. Such being the sentiments of those friends with whom Mrs. *Katharine* was most nearly interested, and whom she fell naturally to consult and advise with, it is scarcely credible to suppose, that she was not in the secret of this whole transaction, and thoroughly approved of and accepted

ted the provision of the deed in question. This the petitioners apprehend is natural and presumable, altho' there was no evidence in support of it.

But, with submission, the matter does not rest upon presumption; for in her answer to query second, she has acknowledged, that the bond was negotiated by her uncle Sir *Patrick Dunbar*; she owns too, that he cautioned her to be silent on the subject of her mother's contract, as the bond would do her no harm, which advice she appears to have followed. Now, with submission, those facts confessed by the Lady herself, are sufficient to bar her repudiation of this bond of provision; for either it must be supposed, that this deed was fairly accepted of, or that this lady and her uncle concurred in a scheme to deceive her own father, by pretending they had accepted of this bond, thereby expecting to hold him bound when they were free. If this was their scheme, which the petitioners cannot believe it was, your Lordships would not give countenance to it; for if you are satisfied, that this Lady, either by words or circumstances, gave her father reason to believe, that this bond was honestly and truly accepted by her, you will not allow the father to be defrauded, out of that belief, or the daughter to escape under any such mental reservation as this.

Again, in her answers to the 3d and 8th queries, she acknowledges, that Sir *Patrick* showed her the bond after he obtained it; and that she read it over and returned it to him, without making any objection; and that the bond having afterwards been transmitted to *Edinburgh*, to be put into the publick register of this court, she gave her uncle half a guinea to get two extracts of it, one to her, and another to himself.

And in her answer to the 9th query, she acknowledges, that her uncle gave her an extract of the bond before her father died, which she had in her custody; and as she did not make it a secret, might have shown it to severals of her acquaintances.

The petitioner shall not trouble your Lordships with observations upon more of the particulars in Mrs. *Katharine's* answers, they will be perused by your Lordships; and it is submitted, whether, upon the whole *res gesta*, there can be any doubt, that Mrs. *Katharine* did, in the 1756, accept of, and consider this bond as her just and lawful provision, in discharge of her claim of

conquest, with the concurrence and advice of her nearest friends and best advisers : And if your Lordships are satisfied, that such was her opinion and conduct in the 1756, you will not give way to any subterfuge, evasion or after thought, since devised to overturn to rational a family transaction.

Neither can the petitioner, with humble deference, rest satisfied with the reasons assigned by the Lord Ordinary in his interlocutor.

It is said, “ That it is an agreed fact, that Mrs. *Katharine Sinclair*, at the time of the alleged transaction, was living in “ family with her father, and that there is no deed under her hand, “ renouncing her claim on her mother’s contract of marriage.”

But, with submission, these circumstances ought rather to operate the other way. If this deed had been a proposition made by a father to his daughter, without the intervention or knowledge of her friends, or those who were interested to see to a proper execution of the mother’s contract of marriage, there might have been some reason for suspecting this transaction : But when it takes place at the instigation and sollicitation of the young lady’s own friends by the mother’s side ; when it is carried into execution, with the advice and approbation of her own uncle Sir *Patrick Dunbar*, who was the custodian of her mother’s contract of marriage ; it is difficult to conceive in what respect the lady’s living *intra famulam* with her father, ought to operate against this transaction ; or rather how the execution of it in such a fair and avowed manner, ought not to operate strongly in support of the presumption of acceptance, for which the the petitioners now contend.

Again, as to there being no deed of renunciation under the hand of Mrs. *Katharine* of her claim under her mother’s contract of marriage, the petitioners must be forgiven to observe, that if this had been a transaction betwixt aliens or strangers, the want of such a renunciation might have been founded upon with much plausibility ; but in a family transaction of this kind, where a father was the contractor on the one hand, and on the other, a daughter, with the advice and concurrence of her nearest and best friends, your Lordships are not to expect the same strictness and accuracy of procedure ; if you are satisfied, that Mrs. *Katharine*, agreeable to her sentiments in the 1756, would not have hesitated to grant such a deed, if at that time it had been thought material, and, in fact, if your Lordships are satisfied that Mrs. *Katharine*

rine Sinclair did accept of the deed 1756, there was no necessity for any deed under her hand, renouncing her claim on her mother's contract of marriage; for as the bond in question bears an express condition of its being granted by *Southdun*, and accepted by her in full satisfaction of her share of the provisions contained in that contract, particularly, of the conquest; so, her acceptance of it was as effectual a renunciation, as any deed under her hand could possibly be.

It is further said, "that she, after her father's death, never made any claim upon this bond, nor never made any claim upon it in her father's life."

As to these circumstances, your Lordships know, that immediately on *Southdun's* death, there arose sundry questions between the petitioners and Mrs. *Katharine*, and others, who claimed an interest in his succession, and during the subsistence of these questions, there was scarce any room for claiming upon this bond; but it is believed, she never thought of repudiating this bond, till in the course of these questions, she observed, that certain lands had been acquired by *Southdun*, during the subsistence of his second marriage, and was tempted to lay hold of these as conquest, because apparently, more considerable than the 1000 *l.* tho', as has been already observed, she will not find her expectations answered, when the proper deductions are made, even if she should prevail in the present question.

With regard to what past during *Southdun's* lifetime, your Lordships will observe, the bond was not payable till his death, or her marriage; and as she is still unmarried, she could claim nothing while he lived, but her maintenance, cloathing, &c. which he was thereby bound to furnish, and which he accordingly did furnish to her.

Upon these grounds, it is humbly hoped your Lordships will be of a different opinion from the Lord Ordinary, and that Mrs. *Katharine* is barred from insisting in this claim, by her acceptance of the bond of provision 1756.

But to proceed to the *second* point, which is to prove to your Lordships, that even altho' Mrs. *Katharine Sinclair* is not barred from insisting in the claim of conquest, still that claim will fall to be ascertained upon much less extensive *data*, than she has been pleased to assume; for it is submitted, that Mrs. *Marjory Sinclair's* renunciation of her share of the conquest, should operate

perate a discharge of the full half, and the share of Mrs. Katharine should be restricted to the other half only.

The petitioners have not been able to discover any decision of your Lordships, precisely determining the effect of a renunciation of conquest, by one of the children, in circumstances such as the present : This question, therefore, falls to be determined upon principles ; and in that view, the petitioners propose to state what occurs with regard to the nature of a claim or conquest, and to apply these principles to the question now before your Lordships.

It seems to be an established point in the law of Scotland, that in all provisions to children stipulated in a contract of marriage, the children are understood to be creditors in that provision : and the father is considered as the debtor of his own children. It is unnecessary to quote decisions to your Lordships upon this point, which seems, with submission, to be undeniably established. If a husband is bound in a contract of marriage to provide the issue of the marriage, the heir or children may call for implement without a service : and, in like manner, they will transmit to representatives their *jus crediti*, without a service : Many examples of a similar nature might be produced in support of this proposition : but it seems unnecessary, as it will probably not be denied, that in all obligations, whether of conquest, or otherways, stipulated in a contract of marriage, in favour of children : these children are considered as creditors under the contract of marriage.

And in the like manner, the father is considered as a debtor to a certain effect. Upon this principle it is, that altho' the law has intrusted a father with the power of doing onerous or rational deeds, yet, he is excluded from the power of disappointing the *jus crediti* of the children, by gratuitous deeds : This circumstance of fact, is sufficient to prove the proposition which the petitioners have presumed to lay down as law : for if children were considered merely as heirs, and not as creditors under a contract of marriage, it would be impossible, upon any principle whatever, to restrain the father from the exercise even of gratuitous deeds.

If this then be a full idea of an obligation, and claim of conquest, it is to be seen that the children are merely creditors, and the father merely a debtor, the petitioner would gladly know any other

ther example in law, where a discharge granted by a creditor, would not operate in favour of the debtor; but if the plea of the pursuers is well founded, then your Lordships are under the necessity of establishing that other singular proposition, *viz.* that a discharge granted by a creditor, will not liberate the debtor from his obligation to that creditor.

Suppose an assignation, granted by a child of a marriage to any third party, of her right to a share of conquest, it does not seem to admit of a doubt, that such an assignation, however effectual it might be to extinguish the claim in the person of the original creditor, still the assignee would be justly intitled to draw a share of the conquest, in proportion with the other children, claiming as creditors under a clause of conquest in a contract of marriage. And this doctrine would not only hold, where a third party was the assignee to the claim of conquest, but the same rule would take place, where the father himself was the assignee of his own child; and if this be the case, it is difficult to make a distinction betwixt an assignation, and a discharge to a father, when the father himself is debtor in the obligation discharged.

The pursuers have instituted a comparison betwixt a claim of conquest, and a claim of legitim; and it is said, that as in the case of the latter, a renunciation by one child, does not diminish the extent of the legitim; so neither, on the other hand, can a discharge of conquest diminish the claim of conquest provided by a contract of marriage.

But supposing the doctrine laid down by the pursuers, in the case of legitim, to be true, the argument drawn from it will not apply to the present case: There is no similarity betwixt a claim of legitim, and a claim of conquest; the claim of legitim due to children upon the death of their father, is not considered in the eye of law, as a debt due by the father, it is considered as a provision of law, whereby, upon the death of a father, a certain proportion of his moveable effects is to be distributed amongst his children; and as this is a provision of law, only arising upon the death of the father, so the father is not in this matter, in his own lifetime, in any respect considered as the debtor of his children.

The case is different, with regard to a claim of conquest; for altho' the father in his own lifetime, is not restrained from alto-

gether extinguishing the legitim, even by donations, and the most gratuitous deeds: Yet your Lordships know, as has been already observed, the matter stands quite otherways, with regard to an obligation of conquest, for there the father is a debtor, and cannot disappoint the *jus crediti* of the children, by any gratuitous deeds.

In like manner, altho' the right of legitim is not a debt due to the children, previous to the death of their father, the law stands otherways with regard to conquest; for, in that case, the debt is constituted in favour of the children *proventu suo*, from the date of the contract. From that moment the *jus crediti* is in them, altho' the precise amount of the claim cannot be ascertained till the dissolution of the marriage.

In these material particulars, therefore, the legitim and conquest, differ by the law of Scotland. 1st, The legitim is not a debt due by the father, but a provision of law, independent of the father.—2^d, The claim of legitim has not an existence, previous to the death of the father, in both of which particulars, it differs from the case of conquest.

When these differences are attended to, it will be found that any argument drawn from the case of Legitim, and the remission of a legitim, will not apply to a discharge of a claim of conquest.

For as the legitim is not a debt due by the father, nor arising at all till after his death, it is obvious, that a remission granted to a father, who is not the debtor, and when the right of legitim has not yet an existence till after his death, cannot have any influence upon the extent of the legitim, which is a legal right, distributed by the law itself without the intervention of the father, and arising only after his death: But in the case of conquest, the discharge must be attended with very different effects, as not only the debt exists from the date of the contract of marriage, but the father himself is the debtor in the obligation.

In order to render the case similar, it is necessary to suppose, a case where the remission, or discharge of legitim is granted at a period when the legitim has become due, *scilicet* after the death of the father; in which case, if the petitioners mistake it not, the remission granted by our child, would not have the effect to enlarge the share of legitim in favour of the other children, such appears to be the import of the decision given by your Lord-

ships.

ships, in the case of *Marion Henderson*, against *David Henderson*, June 1728: "*Claud Henderson* had a son and three daughters, the eldest in her contract of marriage, accepted a provision in satisfaction, the son obtained a general disposition from his father of all his effects, with the burden of certain provisions to the two youngest daughters after the father's death; the second daughter ratified the disposition to her brother, accepted of her provision, and renounced any claim she had of legitim: The youngest neglected her provision, and took herself to her claim of legitim: The Lords found that the eldest daughter being forisfamiliar before the father's death, the brother could claim no share nor interest in the legitim upon her account; and that the second daughter not being forisfamiliar at the time of the father's decease, had right to a share of the legitim, and did, by her ratification and renunciation communicate her share to her brother."

Dict. vol.
P. 545.

By this decision it is established, that a renunciation of legitim does not operate in all cases, so as to extend the claim of legitim in favour of the remaining children; but there is a manifest distinction made betwixt a renunciation of legitim granted before and after the father's death: In the former case, it does not operate any diminution of the claim of legitim; in the latter, it does; and the reason is obvious, that, in the former case, the right of legitim had not yet an existence; and therefore, a discharge granted by one of the children, could not diminish that subject, which the law has declared to be due to all the children existing and unforisfamiliar at the time of their father's death: But in the latter case, as, by the father's death, the legitim was a right which then had an existence in favour, *pro indiviso*, of all the children unforisfamiliar; so, upon the common principles of law, a discharge or renunciation by any of the creditors in the claim of legitim, has justly the effect of extinguishing that claim *pro tanto*.

So much with regard to the general argument maintained by the pursuer.—But if the petitioners misapprehend not the import of the Lord Ordinary's interlocutor, he has founded his opinion upon another point, *viz.* That as *Southdun* had, by the contract 1722, the power of distributing the conquest; so, by providing his daughter *Marjory* 10,000 merks, as her share, he did in effect

fect only exercise that power of division, and so remained liable to the other daughter for the residue.

The petitioners shall admit the doctrine established by the interlocutor, provided such a distributive power as is here supposed was actually veiled in the father, and provided it was his intention, by granting the 10,000 merks to Mrs. *Marjory Sinclair*, to exercise this power of distribution. But the petitioners must humbly beg leave, in a few observations, to dispute both these alternatives.

1^{mo}. Such a distribution in favour of the younger daughter, in preference of her elder sister, is not to be naturally presumed, unless some deed, or some circumstance can be pointed out, from which such an intention on the part of *Sutherland*, is established. But as, on the one hand, there is no circumstance pointed out by the pursuer, from which it can be inferred that *Sutherland* had any such intention; so, on the other hand, the petitioners do humbly apprehend, there is satisfying evidence before your Lordships, that *Sutherland* never intended any such partiality in favour of his younger daughter; for, as by her contract of marriage, Mrs. *Marjory* had only received 10,000 merks; so, *Sutherland*, in the year 1757, executed the bond of provision, in favour of her and her husband in conjunct fee and liferent, and the children of the marriage in fee, for 8000 merks *S. 15*, which, with the 10,000 merks formerly received, did make up the exact sum of 10000 *l. Sterling*, which, by the bond of provision 1750, he had granted in favour of Mrs. *Katharine*, his other daughter of the second marriage. This is clear evidence, that *Sutherland* had no such partiality and favour for his younger daughter, as could induce him to make use of any distributive power competent to him by the contract of marriage, in order to prefer the youngest daughter to her eldest sister.

2^{da}. Unless the pursuers shall be able to shew to your Lordships, that it was the clear intention of *Sutherland*, in giving the 10,000 merks to his daughter *Marjory*, to exercise his power of distribution, the petitioners do humbly apprehend, there is an obvious principle of law which excludes any presumption of this kind. It has been already shewn, that *Sutherland* was debtor to his daughters by the clause of conquest, *debitor non presumitur donare*. And hence when a debtor makes a transaction which is in the least doubtful, it must be presumed, that he intended to operate

operate his own liberation. As *Southdun* was here debtor in the conquest; so, when he took the renunciation from one of his two daughters, it must be presumed, that he meant to take a discharge in his own favour of all the share she could otherways have been intitled to. and not virtually to procure a renunciation in favour of his other daughter.

3^{tio}, When a father makes use of any such power of distribution competent by a contract of marriage, as is supposed to have been done by *Southdun* in the present case, the deed making such a distribution, always expresses, that the deed then executed is in the exercise of the powers competent to the father in virtue of such a contract. But no such declaration occurs in *Marjory's* contract of marriage, on occasion of her receiving the 10,000 merks; and therefore, it is not to be presumed, that *Southdun* meant to exercise any power of distribution competent to him, but rather that he meant to operate a liberation to himself *pro tanto*, from the claim of conquest competent to his daughter *Marjory*, as one of the children of the second marriage.

Lastly, What seems to put this matter out of doubt, is, that if *Southdun* had meant, by granting the 10000 merks to his daughter *Marjory*, to exercise his power of distribution, as is supposed in the Lord Ordinary's interlocutor, he certainly would have carried that intention into execution, in the form and manner prescribed by the contract itself.—But it seems impossible that this can be supposed, when your Lordships are informed, and attend to this circumstance, that it was not in the power of *Southdun* by himself, to have exercised such a power of distribution; for, by his contract of marriage with Mrs. *Marjory Dunbar* his second wife, the provisions therein stipulated for the children, are to be divided, and distributed by their father, *with consent of their mother*, during their lifetimes; and failing such distribution or division, by two of the nearest of kin of the father's side, and two of the mother's side. Such being the case, it does not occur how any transaction, executed merely by *Southdun* himself, can be construed as an exercise of that power of distribution, which was to be executed in the precise manner ascertained by the contract.

Upon the whole, it is humbly hoped your Lordships will see cause to alter the Lord Ordinary's interlocutors complained of.

May it therefore please your Lordships, to alter the Lord Ordinary's interdictors reclaimed against; and to find, 1mo, That Mrs. Katharine Sinclair's acceptance of the bond of provision granted to her by Southam, is sufficiently instructed, and that therefore she must hold the same in satisfaction of her claim to conquest; or, at least, 2do, To find, that Mrs. Marjory Sinclair's renunciation of her share of that conquest, must operate a discharge of the one half, and restrict the share of Mrs. Katharine to the other half.

According to Justice, &c.

HENRY DUNDAS.

CONDESCENDENCE of FACTS for Miss Katharine Sinclair to confess or deny.

1mo. *A* Before the time of *Southam's* third marriage, had you any conversation with Sir *Patrick Dunbar* your uncle, Mr. *Sinclair* of *Humphreys* your brother-in-law, and Mr. *Sinclair* of *Dunbar* your cousin, or any other of your friends, upon the subject of your obtaining a bond of provision from your father? And did not all of you think it proper and necessary, that your provision should be ascertained previous to *Southam's* entering into the contract with his third wife?

2do, Is it not consistent with your knowledge, that Sir *Patrick Dunbar*, Mr. *Glynn* minister of *Hever*, and your mother-in-law, did all of them solicit and importune *Southam*, to settle your provision?—Did not you approve of their doing so? and did not one or other of them acquaint you from time to time of their success?

3do, Was not the bond for your *L. Dowry*, dated 19th July 1756, granted in consequence of this solicitation?

4th, Did not *Southam*, or Sir *Patrick Dunbar* put this bond into your hands, at your father's house, soon after it was granted?

—Did you keep it yourself, or return it to Sir *Patrick*, to be kept for your behoof?

5to, When this bond was granted, did not your sister and you, Sir *Patrick Dunbar* your uncle, and *Harpdale* her husband, all of you consider your mother's contract of marriage as fully implemented?—Did not Sir *Patrick*, who had the custody of your mother's copy of that contract, deliver it up to *Southdun* accordingly, and was not this done with your privity and approbation?

6to, Was not you informed, that in *Southdun's* third contract of marriage, he intended to provide his whole estate (including the lands you now claim as conquest) to the heir male of that marriage? and, for that reason, was you not desirous to have a bond of provision? and when the bond was obtained, did not you and your friends concur and approve of the contract, which bears date two days after the bond, and to which your uncle and brother-in-law are witnesses.

7mo, Was it you, or your uncle Sir *Patrick Dunbar*, that sent the bond to *Edinburgh*, to be registred?—By whom was it sent?—By Mrs. *Whitney*, or any other person?—Had you any conversation or correspondence with her about it, or any other person whom you sent it with?

8vo, Who employed *David Lothian* writer in *Edinburgh*, to put it on record?—Did he send the extract to you, or to your uncle, and who paid him the registration dues?

9no, Had you not the bond, or at least the extract, in your custody, long before your father's death, and did not you show it to your friends and acquaintances upon many different occasions?—Who were the people to whom you showed it, and what past upon these occasions?

10mo, Did you not live in family with your father, until his death in 1760, and did he not furnish you with cloaths, and all other necessaries, in terms of the bond?

11mo, Had you ever any conversation with your father at the time of granting this bond, or at any time after, during his life, on the subject of your provision?—And had he not reason to believe, that you, and your friends on the mother's side, were fully satisfied with the bond he had granted you?

12mo, Is it not consistent with your knowledge, that your father was importuned to give some additional provision to Mrs.

Marjory

Mary your sister, which at length procured from him the bond of service, to put her on a footing with you.—And did you hear him say, or was you informed, that he said that he granted this last bond unwillingly, to avoid further solicitation; but that he had it still in his power to revoke?

ANSWERS, in terms of the Interlocutor of the 11th of *February* 1767, by *Miss Katharine Sinclair*, Daughter to *David Sinclair* late of *Southdun*; To the Queries given in by *Stewart Threipland* Doctor of Medicine, to be put to her.

THE respondent thinks it hard to be obliged to give particular answers to so many questions at this distance from her country, and in a remote corner, where she can have few to advise her, as she foresees that she may be thereby led to say something thro' want of skill or inadvertence, which may be urged to her disadvantage. And she cannot help suspecting this may be designed by the pursuer, in time or other of the queries. She therefore begs leave before any particular answer to these queries, to represent and answer in the general, that she made no bargain, either by herself, or by any other person, with her father, for the bond of provision in question; nor was there any bargain ever proposed to her in his name; and she affirms, from what passed at that time, that if a bargain of taking that bond in lieu of her interest in her mother's contract of marriage, had at that time been proposed to her, she would have rejected the offer. To the particular queries she answers as follows:

To query 1.—She answers, she does not remember any commission she had with any of the persons named in this query, about her obtaining a bond of provision from her father, nor had she any influence on account of his third marriage, or on any other account, to procure such a bond.

To query 2.—She knows not whether the persons therein named, did, or did not solicit or importune her father to procure the bond of provision from him for her; but she affirms, she did

not employ any of them: And, with respect to her uncle in particular, she remembers, when he told her of her father's intending to give her the bond in question, the respondent answered, that she did not want it, and was satisfied as she was, and inclined to let her father know this; and he then told her, she must be silent on that head, unless she would break with her father; but assured her the bond could do her no harm, and would not affect the right she claimed by her mother. And this he gave several different times afterwards to her as his opinion.

To query 3.—She answers, The bond was not granted in consequence of her solicitation, either by herself, or any other person.

To query 4.—She answers, *Southdun* did not give her the bond; her uncle *Sir Patrick Dunbar* shewed it to her; and after reading it over, she returned it to him, but without her saying any thing to him or he to her.

To query 5.—The first part of this query, she is advised, resolves into an opinion on a point of law, which she does not consider herself as obliged to answer, nor to say what opinion her friends then had of it:—She never heard from *Sir Patrick Dunbar*, nor from any other person, that *Sir Patrick* gave up her mother's side of the contract of marriage to *Southdun*, in consequence of the bond of provision to her, and she does not believe that he did it; it surely was not done with her privity or consent.

To query 6.—She answers, That she did not concern herself about what settlement her father made of his estate in his third contract of marriage; she had not skill to foresee any consequences to her loss, and was not alarmed:—Her concurrence in that contract was not asked, nor did she know of any connexion the bond in her favours had with that contract.

To query 7.—She answers, She did not send the bond to *Edinburgh*; it was no time in her custody; she had no conversation or correspondence with *Mrs. Whitney*, or any other person that she remembers about registering the bond, other than *Sir Patrick*, whom she might have heard speaking of it.

To query 8.—She answers, she knows not who employed *Mr. Lothian* to put it on record; or, if he was employed for that purpose, who paid him; nor did she know a person of that name at that time; nor does she know any thing about the payment

of the registration dues :—Some time after she had seen the bond, and returned it to her uncle, she does not remember at what distance of time, her uncle asked one half guinea from her, which she gave him, and which he said was to get two extra ls. of that bond from the register, one to her, and another to himself.

To query 9.—She answers, She never had the bond in her custody, other than what she has acknowledged in her answer to the *third* query. Her uncle gave her an extract of the bond before her father died, which she had in her custody, and, as she did not make it a secret, might have shown to several of her acquaintances. She cannot remember who they were, nor what might have passed in conversation with them on that subject.

To query 10.—She answers, She lived in family with her father, until his death in 1763; and on the same terms, as she thought, as she had done before granting that bond, furnished in cloaths and all other necessaries by him.

To query 11.—She answers, She never had any conversation with her father during his life, neither at the time of granting the bond, nor before nor after that time, on the subject of her provision; nor ever employed any person to converse with him for her; nor had she any message from her father to her on that subject.

To query 12.—She is advised, That she is not bound to give an answer, as it does not respect her, nor the bond in question, and has no concern with it. And if she may be allowed to enter into other particulars, she can inform my Lord Ordinary, That her father understood, that when he gave a thousand pounds of richer with Mrs. *Threpland*, that he was giving this in lieu of all demands, and of any claim which she might pretend to on account of the debt in One thousand seven hundred and sixteen.

Thurs, 25th February,
1767.

W^m. SENECAIR.

JULY 30, 1767.

A N S W E R S

F O R

Mrs. *Katharine Sinclair*, second lawful Daughter of the deceased *David Sinclair* of *Southdun*, by the also deceased Mrs. *Marjory Dunbar*, his second Wife, and for *James Sinclair* of *Duran*, Esq; her Trustee,

T O T H E

P E T I T I O N of *David Threipland-Sinclair* and *Stewart Threipland* of *Fingask*, Esq; his Administrator in Law.

I N 1714, *David Sinclair* of *Southdun* intermarried with Lady *Janet Sinclair*, Sister to the late Earl of *Caithness*, without the Knowledge or Consent of the Friends or Relations of that Noble Family; and, though it is believed that he would not have met with a *Denial*, had he demanded her in regular Courtship, being a Gentleman of a very good Family in that County, and possessed of no contemptible Estate, the Friends of that Noble Lady were, or pretended to be, highly affronted therewith; and, though she had not one Farthing of Portion, it was made a Condition of their being reconciled to the Marriage, that *Southdun* should execute one of the most irrational and absurd Settlements, in favour of the Lady and the Issue of the Marriage, that ever entered into the Head of any rational Man.

1714.

Accordingly, by Deed, of this Date, *Southdun* became bound to provide and secure, not only his paternal Estate of *Southdun*, but also certain other Lands of considerable Value, which had been purchased during his Minority, and all that he should conquest or acquire during the Marriage, to the Lady in Liferent, and to the Heirs of the Marriage, male or female, in Fee; and, to compleat the whole, in the Event of the Marriage dissolving by *Southdun's* Pre-decease without Issue, the Fee of the whole moveable Estate, which should then pertain to *Southdun*, was provided to the Lady.

1716.

None of *Southdun's* Friends were made acquainted with this most irrational Settlement; it was taken from him *remotis arbitris*; and, in order the more effectually to conceal the same, *Southdun*, then a young Man, unacquainted with Business, or the legal Import of such Deeds, was made to transcribe it with his own Hand, from a Copy delivered to him by the Lady's Friends; and, as no Power or Faculty was thereby reserved to *Southdun* of altering the same in any Event whatever, the Consequence thereof would be, that, supposing *Southdun* to have had Issue-male of another Marriage, the Daughters of that Marriage would be preferable in the Succession of his whole Estate, to his Sons of another Marriage.

This Marriage dissolved by the Death of Lady *Janet* in 1720, leaving Issue one Son and three Daughters; but, as the Son and the eldest Daughter died soon thereafter in a State of Infancy, the only surviving Children of that Marriage were the two youngest Daughters, *Jean* and *Janet*.

In 1746, *Jean*, the eldest of these two Daughters, intermarried with Sir *William Dunbar* of *Westfield*, without her Father's Privity or Knowledge, and died in 1749, leaving Issue one infant Daughter, who survived her Mother but a few Months. *Janet*, the other Daughter, in 1753, married *Stewart Threipland*, Doctor of Medicine, and died in 1755, leaving two Children, *David*, the Petitioner, and *Janet*, who are the only Issue alive descended of *Southdun's* first Marriage.

1722.

Of this Date, *Southdun* entered into a second Marriage with Mrs. *Marjory Dunbar*, and, by Marriage-articles, " he became bound " and obliged to settle and secure the Sum of 10,000 Merks, and " whatever Lands, Heritages, Sums of Money, or others whatsoever he should happen to conquest or acquire during the Marriage, the one Half thereof to the said Mrs. *Marjory Dunbar*, in " Liferent, by and attour her Liferent-provision of 500 Merks, (to " which, by a former Clause, she was specially provided,) and the " whole to the Children of the Marriage in Fee, to be divided amongst them by the said *David Sinclair*, with Consent of their " said Mother; and, failing such Distribution, by two of the " nearest of Kin on the Father's Side, and two on the Mother's " Side."—And, in order to ascertain the Extent of the Conquest, and thereby to prevent any Ground of Dispute respecting that Matter between them and the Children of the first Marriage, it was thereby declared, that nothing shall be repute Conquest, but what

what the said *David Sinclair* shall be worth at the Dissolution of the Marriage, beyond his present Land-estate, and after Payment of all the just and lawful Debts, *contracted or to be contracted by him during the Marriage.*

During the Standing of the second Marriage, *Southdun* acquired a Wadset of the Lands of *Latheronwheell*, redeemable for Payment of 20,000 Merks, a Wadset of the Lands of *West Cannesby*, redeemable for Payment of 4447 *l. Scots*, certain Houses in the Town of *Thurso*, and the Lands and Estate of *Dun*, the Rights of all which were taken to *Southdun* himself, and his Heirs-general, though subject to the Obligation, contained in his second Marriage-contract, of providing or securing these to the Issue of that second Marriage.

This second Marriage did in like Manner dissolve by the Death of Mrs. *Marjory Dunbar* in 1755, leaving Issue two Daughters, *Marjory* and *Katharine*.

In 1748, *Marjory*, the eldest of these two Daughters of the second Marriage, intermarried with *John Dunbar*, Son to Sir *Patrick Dunbar* of *Northfield*, and by the Marriage-contract, to which *Southdun* was a Party, he became bound and obliged to pay to Sir *Patrick Dunbar*, in Name of Tocher with his said Daughter, and as her Share of the Conquest, the Sum of 10,000 Merks, at the Terms therein specified, without any further Explanation of what was intended by these Words, and as her Share of the Conquest, as no Reference or Relation was thereby had to *Southdun's* Contract of Marriage with his second Lady, whereby the whole Conquest, during that Marriage, was provided to the Issue of that Marriage, further than as this may be supposed to have been the Conquest referred to, and intended by the above Expression.

This Marriage between *John Dunbar* and *Marjory Sinclair* was of short Standing, and dissolved by *John Dunbar's* Death without Issue, whereupon she intermarried for the second Time with *James Sinclair* of *Harpsdale*, by whom he had Issue one Son and four Daughters, and she herself died in 1763.

Of this Date, during the Standing of the aforesaid Marriage between the said *Marjory*, the eldest Daughter of *Southdun's* second Marriage, and Mr. *Sinclair* of *Harpsdale*, her second Husband, *Southdun* granted a Bond of Provision for the Sum of 8000 Merks, payable at the first Term of *Whitsunday* or *Martinmas* after his Death, in favours of his said Daughter *Marjory* and her Husband,

in

in Conjunct-fee and Liferent, and to the Child or Children, male or female, procreate or to be procreate between them, by the Proportions therein specified. It proceeds on the Narrative, that the Provisions made for the younger Children, procreate or to be procreate betwixt his said Daughter and *Harpisdale*, were too mean, and that he therefore thought proper to add the Sum of 8000 Merks to their Provisions, with the Burden of their Father and Mother's Liferent; and it is thereby declared, "That said Sum of 8000 Merks, and the Sum of 10,000 Merks, *formerly* paid by him to his said Daughter in Name of Tocher, and for her Share of the Conquest, are granted by him, and accepted by her and her said Husband, in full Satisfaction to her of her Share of the Provisions granted by him in the Contract of Marriage betwixt her deceased Mother and him, in favours of the Daughters of the Marriage, *failing Heirs-male*, and in full Satisfaction to her of the Provision of Conquest of Lands and Heritages whatsoever, which should be acquired during the Marriage, granted by him in favours of the said Daughters, *failing Heirs-male*, and in full Satisfaction to her of her Portion-natural, Bairns Part of Gear, Share of Moveables, Legitim, or other Pretensions whatsoever, which she, as one of the only Daughters or Children of said Marriage, can anyways ask, claim, or pretend Right to by, or through her said Mother's Decease, or his the said *David Sinclair's* Decease, excepting his own Good-will allenarly, *and her Succession to his Estate, if the same should fall to her by Right of Blood, or any Settlement made or to be made by him.*" It dispenses with the Not-delivery, reserves a Power to alter, and was found in *Southdun's* Repositories after his Death.

As this Bond was never delivered to the said *Marjory*, or her said Husband, but remained in *Southdun's* Repositories, and under his Power, till after his Death, and has not hitherto been accepted of by *Marjory* herself, or by her said Husband, or by her Children since her Death, the following Observations do from thence arise: 1st, That as *Southdun* had not then under his Eye his Contract of Marriage with the Mother of *Marjory*, he seems plainly to have misapprehended the Import of the Provisions therein contained, in favours of the Children of said Marriage, in so far as he thereby clearly supposes, that the Daughters of that Marriage had no Right, Title, or Interest, either in the 10,000 Merks thereby specially provided, or in the Provision of Conquest, but upon Failure of

of Issue-male of said Marriage; whereas, from the whole Tenor of said Marriage-contract, it is apparent that both the 10,000 Merks and the Conquest were indiscriminately settled and secured to the whole Children of that Marriage, male or female.

2dly, From the many anxious Clauses therein contained, declaring the 8000 Merks thereby provided, with the 10,000 Merks formerly given in name of Tocher to his said Daughter upon her first Marriage with Mr. *John Dunbar*, to be in full Satisfaction of all she could claim in Right of her Mother's Contract of Marriage, Provision of Conquest, and Portion-natural, Bairns Part of Gear, Legitim, &c. it is manifest and clear that *Southdun* did not understand his said Daughter to have been *previously* excluded from these her legal Claims by the Tocher of 10,000 Merks given to Sir *Patrick Dunbar*, the Father of her first Husband, in her first Contract of Marriage; as supposing her to have been thereby previously excluded, all these anxious Clauses in this additional Bond of Provision must have appeared superfluous and unnecessary. And if she was not previously excluded from these her legal Claims, by the Provision of 10,000 Merks in her first Marriage-contract, it is equally apparent, that neither she nor her Children could be *excluded* therefrom by this additional Provision of 8000 Merks, as her Acceptance thereof is made the Condition of that Exclusion.

3dly, As the Exclusion thereby conditioned is declared to be but Prejudice of her Succession to her Father's Estate, in case the same shall fall to her by Right of Blood, or by virtue of any Settlement *made* or to be made by him; and as *Southdun*, by the general Settlement which he then had made of his whole Estate, had settled and secured the Succession to her, in her natural Course of Seniority, failing Issue of his first Marriage, in the Form of a strict Tailzie, it is reasonable to suppose, that the *Chance* of Succession to the whole Estate, thereby meant to be secured to her, was the impulsive Cause or Consideration which induced *Southdun* to give her so much a less Provision than she was justly intitled to by her Mother's Contract of Marriage, as one of the two Children of said Marriage, with a view to secure the general Settlement and Tailzie he had made of his whole Estate from being brought under Challenge at her Instance.

In the same View, *Southdun*, of this Date, executed another Bond of Provision, in favours of the Respondent, *Katharine*, the only other Daughter of his second Marriage, whereby he became

1756.

bound and obliged, to pay to her and her Heirs, her Executors or Assigns, 1000*l. Sterling*, at the first Term of *Whitsunday* or *Martinmas* after his Decease, and, in the mean time, to aliment her in his Family, and furnish her with Cloaths and other Necessaries; or, in his Option, to pay her 30 *l. Sterling*, to provide these for herself: “ Declaring, as it is thereby provided and declared, that
 “ thir Presents are granted by him, and accepted of by the said
 “ *Katharine Sinclair*, in consideration, and in full Satisfaction to
 “ her, of her Share of the Provisions granted by him in the Contract of Marriage between him and his said deceased Spouse, in
 “ favour of the Daughters of that Marriage, *failling Heirs-male*;
 “ and in Consideration and full Satisfaction to her, of her Share of
 “ the Provisions of Conquest or Lands and Heritages, and others
 “ whatsoever, which should be acquired during the Marriage,
 “ granted by him *in favours of the said Marriage, failling Heirs-*
 “ *male*; and in Consideration and full Satisfaction of the said *Katharine Sinclair* her Portion-natural, Bairns Part of Gear, Share
 “ of Moveables, Legitim, or other Pretensions whatsoever,
 “ which she, as one of the only two Daughters and Children of
 “ said Marriage, can anyways ask, claim, or pretend to from
 “ him, by and through the Decease of their Mother, or his; and
 “ the said *Katharine Sinclair*, by her Acceptation hereof, declares,
 “ that thir Presents are granted, and accepted by her, in full Consideration, and full Satisfaction of the said Premises, and of
 “ all other Pretensions, excepting his own Good-will alienarly,
 “ and her Succession to his Estate, if the same falls to her by Right of
 “ Blood, or any Settlement made, or to be made by her.”

All the Observations formerly made, with respect to *Marjory's* additional Bond of Provision for the 8000 Merks, do equally apply to this Bond of *Provision* in favours of the Respondent, particularly, that her Acceptance thereof was the Condition of her being thereby excluded from these her other legal Claims, and that the Chance of Succession to *Southburn's* whole Estate, under the general Settlement by him execute, was the *inductive* Motive of restricting the Provision both of her and her Sister *Marjory*, to much below what they were otherways justly intitled to by their Mother's Marriage-contract, as the Heirs of that Marriage; but, as that Settlement was, after *Southburn's* Death, brought under Challenge, at the Instance of the now Petitioner, as the Heir of *Southburn's* first Marriage, and actually reduced *quoad* the Bulk of
 that

that Estate, so there will be Occasion in the Sequel to observe, that the Respondent *never* did accept of that Provision; and therefore, as well upon the general Principles of Law, as from the express Condition of the Bond itself, unaccepted of, cannot be thereby precluded of whatever Claims were otherways competent by Law out of her Father's Estate.

Southdun intermarried for the third Time with Mrs. *Margaret Murray*, and as he does not seem to have imagined, that, by any former Settlement, he was anyways bound up or restrained from settling his Succession upon the Heirs-male of his own Body, as he had no Heirs-male of any of his former Marriages, so, by the postnuptial Marriage-contract executed between them, of this Date, he became bound to provide his whole Estate to the Heirs-male of that Marriage, with the Burden of all his Debts and Deeds; and, failing Issue-male, to pay the Daughters of said Marriage the Sums thereby specially provided, in the different Events of there being one or more, in full Satisfaction to them of their Portion-natural, Legitim, Bairns Part of Gear, Share of Moveables, and whatever else they can claim or pretend to, by and through his Decease.

1756.

Of this Marriage there exists one only Daughter, who thereby becomes intitled to a Provision of 18,000 Merks, with Interest, from *Whitsunday* 1760, being the first Term after *Southdun's* Death.

Of this Date, *Southdun* executed a Settlement of the whole Estate he was then possessed of, in the Form of a strict Tailzie, in favours of himself in Liferent, and the Heirs-male lawfully to be procreate of his Body, and the Heirs whatsoever, lawfully to be procreate of their Bodies; whom failing, to *Janet Sinelair*, his second Daughter of his first Marriage, Spouse to Doctor *Stewart Threipland*, and the Heirs-male lawfully to be procreate of her Body; whom failing, to *Marjory*, his third Daughter (the eldest Daughter of his second Marriage) and the Heirs-male lawfully to be procreate of her Body; whom failing, to the Respondent, *Katharine*, his fourth Daughter (the youngest Daughter of the second Marriage) and the Heirs-male lawfully to be procreate of her Body, &c.

1747.

As this Tailzie, fettered with prohibitive, irritant, and resolute Clauses, did, *inter alia*, comprehend the original Family-estate of *Southdun*, which, by the Deed of 1716, *Southdun* had become bound

bound and obliged to settle and provide upon the Issue male or female of that Marriage, even in exclusion of the Sons of any after Marriage, and did, in so far, vary the Destination specified and contained in the Deed 1716, Occasion was taken from thence, in 1762, to bring an Action, in this Court, in name of the now Petitioner, *David Threipland-Sinclair*, and his Sister *Janet*, the only surviving Descendants of *Southdun's* first Marriage, challenging the Entail of 1747, not only in so far as respected the Lands contained in the Deed 1716, but also, in so far as concerned all the other Lands contained in that Settlement.

A Counter-action was brought at the Instance of *Marjory* and *Katharine Sinclairs*, the two surviving Daughters of the second Marriage, as Heirs-substitute in the Tailzie 1747, concluding, to have it found and declared, that the same was a valid and effectual Settlement, binding upon the said *David* and *Janet Threiplands*, and for having *David Threipland* decerned to make up Titles under that Settlement, and under all the Conditions, Provisions, Limitations and Restrictions therein contained.

The Result of these mutual Processes was a Judgment of your Lordships, finding, That *Southdun* could not gratuitously alter the Destination of Succession established by the Deed of 1716, and therefore reducing the Entail 1747, so far as respected the Lands contained in the Deed of 1716; but repelling the Reasons of Reduction, and sustaining the Entail of 1747, so far as regarded all the other Lands therein contained.

And here it may not be improper to observe, that however intent the Petitioner now is, in the Question with the Daughters of the second Marriage, respecting the just Extent of their Claims, to adhere strictly to what appears to have been the Will of their common Parent, in settling the Provisions of these his Daughters of the second Marriage, with a view to strengthen and support the general Settlement he had made of his whole Estate, to the Succession of which they were called in their natural Order, he spoke a very different Language, and did not pay the same pious Regard to the Will of his Parent, when his own Interest was at stake, and in the Challenge which he made of *Southdun's* Settlement 1747, which he attempted to reduce, not only as to the Lands contained in the Deed 1716, but as to the whole Residue of the Estate. Why *Southdun's* Will should be more sacred in the one Case than in the other, is not extremely obvious. The Respondent *Katharine*, and her Sister

Marjory.

Marjory, would have been extremely willing to have acquiesced in their Father's Settlement, had it been allowed to stand in full Force; but as, by the Reduction of the Tailzie 1747, which gives a Fee-simple to the now Petitioner and his Sister, of the Family-estate, they are cut out from all Prospect of Succession thereto, which, upon the Failure of the Petitioner, and his Sister, without Issue, will pass to their Father, a *Stranger* to the Family of *Southdun*, the Respondent can see no Reason why she and her Sister should be excluded, by their Father's Settlements, from these their legal Claims, to which they are intitled as the only Children of the second Marriage.

By this partial Reduction of the Tailzie 1747, *Southdun's* Succession divides amongst the different Heirs in the following Manner:

1st, *David Threipland*, the Petitioner, as Heir of the first Marriage, takes the Family-estate, and other Lands contained in the Deed 1716, being upwards of 7000 Merks of yearly Rent, in Fee-simple, free from all the Restrictions, Fetters, and Limitations imposed by the Tailzie 1747.

2^{dly}, Under the same Deed of Tailzie 1747, so far as unreduced, he takes, in Fee-tail, all the other Lands therein comprehended, to the Amount of about 3000 Merks of yearly Rent, under the Burdens, Conditions, and Limitations imposed by that Settlement.

3^{dly}, *Marjory* and *Katharine Sinclairs*, *Southdun's* Daughters of the second Marriage (if not excluded by Acceptance of the Bonds of Provision granted in their favour) are undeniably intitled to the Lands and other Subjects, conquest and acquired during the standing of that Marriage, and have accordingly established a Title to these by Service, *qua* Heirs of Provision.

4^{thly}, And as *Southdun* had acquired certain other Lands posterior to the Tailzie 1747, which did not fall under any of the aforesaid Destinations or Settlements, the Succession to these falls and belongs to all *Southdun's* surviving Daughters, and the Issue of such as are dead, as Heirs Portioners and of Line.

Southdun died also possessed of a valuable Executry. In what Manner, or by what Proportions any Debts, which *Southdun* was owing, will fall to be paid out of these Estates, is not *hujus loci* to dispute.

It occurred to the Respondent, after the aforesaid Judgment reducing the Tailzie 1747, in part, that the Relief of the Debts was the only Point that remained to be settled, and as this was

thought to be the proper Subject for an Arbitration, a Reference was proposed and entered into, wherein Doctor *Stewart Threipland* took burden upon him for his Infant-children, and Claims and Answers were thereupon exhibited by both Parties; but as the Doctor became apprehensive, that the Issue thereof would not be so favourable to him, he was pleased to drop the Submission, upon pretence, that as the Respondent, and her Sister *Marjory*, had got Bonds of Provision in full of all they could claim, and, more particularly, in Satisfaction of their Claim of Conquest upon their Father and Mother's Contract of Marriage, these conquest Lands must descend to *Southdun's* general Heirs, subject to the Payment of all his Debts, whereby, not only the Lands contained in the Deed 1716, but the other Lands contained in the Tailzie 1747, would remain free to him.

The Respondent, and her Sister *Marjory*, being thus obliged to sue for Justice by legal Process, served themselves Heirs of Provision to their Father, under the aforesaid Marriage-contract, and upon that Title, *James Sinclair of Duran*, as Disponee by the Representative of *Marjory*, the eldest Daughter of the second Marriage, and the Respondent *Katharine*, the youngest Daughter of the second Marriage, brought their Action in this Court, wherein they called as Defenders, *Southdun's* whole Representatives, viz. his Executors, his Heirs of Line, his Heir-male, and his Heir of Tailzie and Provision, and the Scope of the Action is to ascertain the Relief of the Debts, in so far as these shall not be found to be an effectual Charge against the Conquest-lands, and other Subjects, to which they are entitled to succeed as Heirs of Provision, under the aforesaid Marriage-contract, which was the agreed and professed Purpose of the Submission, that was afterwards improperly departed from by the Petitioner and his Father, as aforesaid.

A counter Action was brought at the Instance of the now Petitioner, for having it found and declared, that the Provisions made for *Marjory* and *Katharine*, were in full of any Claim of Conquest that might otherways have been competent to them, and, consequently, that these Conquest-lands must belong to the Heirs of *Southdun's* three Marriages, as Heirs-portioners of Line to him, subject to the Payment, and in relief of the Debts.

These Actions coming before Lord *Auchinleck*, Ordinary, the Points principally disputed were these following: 1^{mo}, Whether *Marjory*, the eldest Daughter, by her Marriage-contract 1748, had discharged

discharged any Claim competent to her, in virtue of the above recited Clause in her Mother's Contract of Marriage. 2do, Whether the Bond of Provision 1756, in favours of *Katharine*, supposing her to have accepted thereof, did, in like Manner, import a Discharge of any Claim competent to her, in right of her Mother's Marriage-contract. 3tio, Upon Supposition, that the Claim of the eldest Daughter was barred, and that the Claim of the youngest Daughter was not barred, whether the Discharge by the eldest Sister could operate so far against the youngest Sister, as to restrict her Claim to the one Half of the Provisions in the Marriage-contract; or, in other Words, whether *Marjory's* Acceptance of a Sum certain, in full of her Claim under her Mother's Marriage-contract, did accrue to *Southdun's* general Heir, whereby the youngest Sister should not be intitled to extend her Claim beyond her own equal Half of the Provisions contained in her Mother's Marriage-contract.

Upon this Debate, the Lord Ordinary, of this Date, pronounced the following Interlocutor: " The Lord Ordinary having considered the Debate, with the several Writings therein referred to, finds, That Mrs. *Marjory* and *Katharine Sinclair*, the Pursuer's Cedents, having been the only Children of the Marriage between *David Sinclair of Southdun*, and Mrs. *Marjory Dunbar*, were intitled to full Implement of the Provisions to the Children of that Marriage, in Terms of the Marriage-articles between their Parents, viz. 10,000 Merks, and the whole that should be conquest during the Marriage, the Conquest being declared to be what *Southdun* should have at the Dissolution of it, over and above the Land-estate he was then possessed of, and after Payment of all Debts he was then owing, or should be owing at the Dissolution of the Marriage. But finds, That neither of these Daughters were intitled to the aforesaid Provision, in regard, the Father, by the Conception of the Contract, had the Power of Division; and therefore finds, that though, in his Daughter *Marjory's* Contract of Marriage, he settled 10,000 Merks upon her, as her Share of the Conquest, which was effectual to cut out *Marjory* and her Heirs, who behaved to rest satisfied with the Division he made, he still continued bound to make good the Provisions to the other Heir of the Marriage, Mrs. *Katharine*, so far as Mrs. *Marjory's* Share had not exhausted

Feb. 11th,
1767.

“ ed them; and before Answer to the Question, how far Mrs. Katharine was cut out from claiming her Share of the Provisions, appoints her to make distinct and pointed Answers to the Questions put to her by the Defender, contained in a Paper apart, and to subscribe her Answers, and return them to this Process as soon as may be.”

Against these Interlocutors mutual Representations were preferred, and on the Part of the Petitioner, in order to instruct, that *Katharine* had truly accepted of the aforesaid Bond of Provision, a Condescendence of twelve different Articles were exhibited, and put to her to confess or deny, and to which she accordingly returned very distinct Answers, Article by Article.

The Condescendence and Answers are subjoined to the Petition, to which therefore it shall suffice to refer. She introduces her Answers with a general Declaration, that she *never* made any Bargain by herself, or by any other Person, with her Father, for the Bond of Provision in question, nor was there any such Bargain ever *proposed* to her, in his Name:—that, to the best of her Remembrance, she never had any *communing* with any of the Persons named, about her obtaining a Bond of Provision from her Father;—that she did not *employ* any of the Persons named, to obtain the Bond of Provision for her, nor does she *know*, whether they solicited or importuned her Father to grant such Bond;—that the Bond was not *granted* in consequence of any *Solicitation* by herself, or any other Person;—acknowledges, that her Uncle, (Sir Patrick Dunbar,) told her of her Father’s Intention to give her the Bond in question, to which she answered, that she did *not* want it, that she was *fatigued* as she was, and *inclined* to let her Father know this, but that Sir Patrick told her, that she must be silent on that Head, unless she would break with her Father, but that surely the Bond could do her no Harm;—that Sir Patrick showed her the Bond, which, after reading, she returned to him, without either of them saying any thing to one another;—that she knows not who put it in the Record, or who employed Mr. *Lothian* to record it; but that, some time thereafter, her Uncle, Sir Patrick, got half a Guinea from her to pay for two Extracts of the Bond from the Register, one to him, and another to herself.

How it is possible to extract from these Answers an Acknowledgment on the Respondent’s Part, of her having accepted of said Bond

Bond of Provision is quite inconceivable, when, if she knows what she intended to express, and has expressed what she intended, her Meaning was directly the reverse of what the Petitioner would suppose to have been the Case.

Upon advising these mutual Representations and Answers, with the aforesaid Condescendence and Answers, the Lord Ordinary, by Interlocutor of this Date, adhered to his former Interlocutor, March 10th,
1767. so far as respected *Marjory's* Claim; and of the same Date, pronounced the other Interlocutor recited in the Petition, respecting the Respondent's Claim, and to this last he adhered by another Interlocutor, of this Date, upon advising another Representation for June 24th,
1767. the now Petitioner.

It was not thought material to give your Lordships the Trouble of a Reclaiming Petition, on the Part of *Marjory's* Representatives, who are Minors; because a Judgment given, in favour of *Katharine*, will be a total Bar to the Petitioner's Plea, and sufficient to support the Right of the Children of *Soutbdun's* second Marriage to the whole Conquest-subjects; as, if *Katharine* did not accept of her Bond of Provision, it is thought to be as clear a Case as any can be made a question of, that, supposing *Marjory* to have been forisfamiliar, and to have accepted of her special Provision, in full of all she could claim by her Mother's Contract of Marriage, the Residue at least of what was thereby provided to the Issue of that Marriage, must be made good to *Katharine*, the only other unforisfamiliar Child of that Marriage, and as *Katharine*, and the Issue of her deceased Sister, are not disposed to have any Differences amongst themselves, it is matter of Indifference, whether the Provisions in their Mother's Contract of Marriage shall be made good to one or both.

In reclaiming against these Interlocutors, so far as concerns the Interest of the Respondent *Katharine*, the Petitioner would persuade your Lordships, that this is a most unprofitable Litigation on the Part of the Respondent, for that, was she to prevail therein, her Expectations would be greatly disappointed, as all that she could take under the Clause of Conquest in her Mother's Contract of Marriage, subject to the Debts which necessarily must affect it, would not be near equal to her Provision of 1000*l.* and that the Petitioner's sole Motive for struggling this Point is, to avoid the Difficulty and Expence of settling, in a judicial Way, the Extent of the Conquest, and the Relief of the Debts.

But as it would be improper, *in hoc statu*, to enter into a Discussion of these Facts, respecting the Value of *Southdon's* Succession, as it now divides amongst his different Heirs, or the Extent of the Debts, or by what Proportions these Debts must be paid by the different Heirs, it is sufficient to say, that every Person must be allowed to judge for themselves in Questions of that Nature. It will not easily be believed, that the Respondent would wantonly engage in a Dispute of this Kind, attended with a certain Expence, had she not good Ground to believe, that her Right of Succession, as Heir of Provision under her Mother's Contract of Marriage, will eventually be much more beneficial than the Portion allotted to her; it does not occur to her, what Difficulty there can be in ascertaining either the Extent of the Conquest, consisting of so many heritable Subjects still extant, or of the Amount of the Debts affecting the same, these are but Scar-crows of the Petitioner's own Fanc'y and Imagination, as an Apology for refusing to do the Respondent that Justice, which, in other Respects, she is so well intitled to; that he may throw Obstructions in the Way, is possible, and perhaps not improbable, but the Apprehension of these are not *tanti* to deter the Respondent from asserting her just Right.

Your Lordships are told that this Bond of Provision was granted at the Sight, and even at the Request of Sir *Patrick Dunbar*, the Respondent's Uncle by the Mother's Side; and as she does not choose to dispute Facts, whereof she has no certain Knowledge, it is very supposable that this may have been the Case, and that Sir *Patrick Dunbar*, in the view of *Southdon's* entering into a third Marriage contract, Questions unforeseen might, in an after Period arise in settling Marches between the Heirs of so many different Marriages, was desirous that at any rate some certain Provision should be made for the Respondent.

She is unwilling to suppose that her Father, whom she had never offended, meant her any Injustice; the Settlement he had made of his whole Estate in the 1747, whereby he had called her to the Succession in her natural Order, is Evidence to the contrary; and it is apparent that both *Southdon* and Sir *Patrick Dunbar* must have had that Settlement in view, when the Bond of Provision bore an express Declaration that it should be but Prejudice of her Right of Succession by any Deed already made, or to be made, by her Father. He had already executed a Settlement which none of his Heirs were at liberty to alter; and as her Prospect of Succession under that Settlement

Settlement was not extremely remote, it is reasonable to suppose that this had some Influence with *Southdun* in restricting her Provision to the 1000 *l*.

But be that as it will, and supposing that both *Southdun* and Sir *Patrick Dunbar* had concurred in the most express Terms in declaring their Opinion that this was a suitable Provision for the Respondent, they must have known that it could not be obligatory without her Acceptance; and accordingly her Acceptance of it is made a *Condition* by the very Bond itself, of its importing a Discharge of the Provision she was entitled to by her Mother's Marriage-contract, she has declared that her Father *never* opened his Mouth to her upon the Subject; that she never *solicited* nor employed any other Person to solicit such Bond in her favour; and she has declared, that when her Uncle Sir *Patrick* told her of her Father's Intentions, she acquainted him that she was satisfied as she was, did *not* desire any such Bond, and *inclined* to let her Father know of it; but was dissuaded therefrom by Sir *Patrick*, as her Refusal might give Offence to her Father.

The Petitioner is pleased to consider this as a Circumstance of Fraud upon her Part, that she did not undeceive her Father in the Opinion he must have conceived, that she was to accept of that Provision. But nothing surely can be more unjust than this; the Bond itself shows that her Father knew her actual Acceptance was necessary; why then did he not require her formal Acceptance thereof? and if there was the least Danger that her Father might be displeased, had she refused her Acceptance, if required, is it possible she can be found fault with for avoiding to incur her Father's Displeasure, by not broaching the Matter to him while he continued silent to her?

It is much more reasonable to suppose that *Southdun*, knowing her Acceptance to be requisite, left it in her free Choice whether to accept it or not, when the Time should come when one or other of these Provisions would take place, *i. e.* at his Death.

It is not, however, a little entertaining, to find the Petitioner talking in this Stile of *implicit* Obedience to the *Will* of the Father, when he himself has shewn in the Face of the most material Article of *Southdun's* whole Settlement, and has thereby cut both her and her Sister out of the *Chance* of Succession they had under that Settlement. She should have been extremely well pleased to have allowed Matters to remain upon the Footing they were settled by
their

their common Parent : but as the Petitioner has prevailed in the Reduction of that Settlement, *quoad* the Bulk of the Estate, and has thereby cut her out from that Chance of Succession, which was manifestly in view when the forefaid Provision was granted to her, she can see no Reason why *Southden's* Will should be *more* sacred to her than it was to the Petitioner.

Taking it therefore for granted, that her Acceptance of this Bond of Provision was essentially requisite to exclude her Claim, as Heir of Provision under the aforesaid Marriage-contract, and as no other Evidence of her having accepted the said Bond of Provision, other than what she herself has confessed, is so much as alledged or offered, she submits it to your Lordships, that there is from thence positive and direct Evidence, that she not only did not accept thereof, but positively refused the same ; nor could she have been compelled to declare that Acceptance till after her Father's Death, as it was then only that her Claim, as Heir of Provision, could take place : And as the Petitioner, by the Challenge he brought of *Southden's* Tailzie, has cut her entirely out from any Chance of succeeding to the Bulk of that Estate, he can with no Justice complain of the Respondent for making the most of her other Claims.

Upon this State of the Case, and upon *Supposition* of *Marjory's* being excluded by the Acceptance of her Provision, in full of all that she could claim under the Marriage-contract, (as to which the Respondent is determined to have no Dispute with her Sister's Children) and that the Respondent herself is not barred, the Question remains, Whether *Marjory's* supposed Exclusion would accresce to *Southden's* general Heirs, so as to substitute them in *Marjory's* Place ? or, whether the whole Benefit from thence arising accrues to the Respondent, the other Child of that Marriage ? And, if she is not greatly mistaken, there is not any Proposition in Law more clear and indisputable, than that this last is the Case.

That this Rule obtains universally, with respect to the *Legitim* being that Portion of the Father's Effects which the Law appropriates to the younger Children *in familia*, in a Question with the Heir, is acknowledged by every Lawyer, established by manifold Decisions, and as such admitted by the Petitioner himself.

Thus it is, that if a Father, in his own Lifetime, gives a Provision to a younger Child, in Satisfaction of the Legitim, Bairns Part of Gear, and what else he can claim out of his Means and Estate at his Death, and which is accordingly accepted of, it is

triti juris, that any Benefit arising from this Forisfamiliarisation, and Discharge by said younger Child, does neither accresce to the Father's general Heir, nor does it enlarge the Dead's Part, or restrict or diminish the Legitim due to the other younger Children *in familia*, at the Father's Death; the Legitim remains the same as before, being a certain Share of the Father's Executry at his Death, which the Law appropriates to the younger Children *in familia* at that Time, in Exclusion of the Heir; in so much that, however numerous these younger Children are, if all of them are forisfamiliar but one, that one has Right to the whole Legitim; and if there are no younger Children unforisfamiliar, the eldest Son and Heir takes the whole Legitim, of which he cannot be disappointed by any voluntary gratuitous Act or Deed of his Father's: These Principles are so well established, that it would be improper to quote Authorities in support of them.

The Executry or Dead's Part is in this respect *in pari casu* with the Legitim, with this only Difference, that the Father has the absolute Power of disposing of the one, to take Effect after Death, which he has not of the other. The Executry belongs to the younger Children, in competition with the Heir, Heirship-moveables only excepted; and, if any Number of the younger Children are forisfamiliar during the Father's Lifetime, supposing the Children so forisfamiliar had got heritable Bonds on Part of their Father's Lands given off to them as Appennages, in full of all they can claim, the Heir, whose Estate was thus diminished, would not be thereby intitled to claim a Share of the Executry, as in place of the younger Children forisfamiliar, and in competition with the other younger Children *in familia*, but the whole Executry or Dead's Part will belong to the younger Children *in familia*.

And if this obtains, both with respect to the Legitim and to the Executry or Dead's Part, no good Reason can be assigned why the same Principle ought not to govern the similar Question, in the Case of Heirs of Provision claiming under a Marriage-contract, where the Provision is not to this or the other particular Child, but to the Children, or to the Heirs of the Marriage in general; and, if there is any Difference between the two, the Principle ought to obtain with double Force in the Case of Heirs of Provision; such as the present by Marriage-contract, where the Provision of Succession is to the whole Bairns of the Marriage.

A Provision such as this gives no *jus quesitum* to any one or more particular Children, further than that they are intitled to some Share, greater or lesser, in the Division. The Provision is *familias*; the Father has an arbitrary Power of Distribution amongst these Children, but he is indispensibly bound to make good that Provision to the Children of that Marriage; and, if one Child, when forisfamiliate, has received a Provision in Satisfaction of all he could ask, the Provision remains entire, especially where it is a Provision of Succession to Lands, and the Children who remain *in familia*, have equal Right to the whole of that Succession, as the whole Children would have had, if they had all remained unforisfamiliate.

A Distinction is attempted between the Legitim, and a Provision such as this, in a Marriage-contract. The Provision is said to be a Debt, which therefore may be discharged or Satisfaction made for it; and as the Father is the Debtor in that Provision, he must undoubtedly be intitled to take a Discharge thereof, when he makes Satisfaction to any of the Children, Creditors in that Obligation; whereas, in the Case of Legitim, there is said to be no proper Creditor or Debtor, as the Legitim, in reality, is no other than that Share which, in the Division of the Father's Executry, the Law sets apart and appropriates to the younger Children *in familia*.

But this is plainly a Distinction without a Difference; and the Argument, if good for any thing, points directly the other Way. In the Case of the Legitim, every Child *in familia* has a determined Right, *viz.* a certain Share of the Legitim, according to the Number of Children, *quæ capita tot partes*, and it is not in the Father's Power to enlarge or diminish the Share of any of these Children, without their own Consent, and therefore it might, with some Appearance of Reason, be contended, that when any of these Children receives from his Father Satisfaction for his Legitim, the Father, or his general Heir, ought to stand in the Place of that Heir; but this the Law does not permit.

But in the Case of Children, Heirs of Provision by Marriage-contract, the very Reverte obtains; the Father is Debtor in that Provision, not to this or that particular Child, or to any Number of them, more or less; it is the *familia* that are Creditors in that Obligation, and the Father has an unlimited Power of Distribution, with this only Exception, that he cannot absolutely exclude
any

any one Child ; each must have an Allotment in the Division, be it ever so small ; the Quantum of each Child's Share is merely arbitrary, but the whole must be made good to the Children of the Marriage ; and where that is the Case, it must be obvious to your Lordships, how incongruous it would be, that the Father's general Heir should step into the Place of any of those Children who have been forisfamiolate, to claim an equal Share with the Children *in familia*, when the Child, if not forisfamiolate, could have claimed no greater Share in that Distribution than the Father was pleased to give him.

At the same time, the Law is not so unfertile of Invention, that Methods might not be devised to accomplish what the Petitioner is here contending for. When such is the Parent's Purpose or Design, he may take an Assignment in his own Name, or in Name of some Trustee, to the Child's Share of the Legitim, or of his Provision of Succession, after ascertaining what his Share of this last shall be ; but where he takes a Discharge, the Child thus forisfamiolate is struck out of the List, as if he had never existed, and the whole Provision, as well as the whole Legitim, vests in the whole Children *in familia* at the Father's Death.

The Petitioner argues improperly, when he considers a Clause of Conquest, such as this, as *in pari casu* with a Bond of borrowed Money, extinguishable by Payment, or Satisfaction made.—A Clause of Conquest is a Provision of Succession, to which a Title must be made up by Service *qua* Heir ; for tho', while the Provision rests upon the mere personal Obligation, to secure which, Action may be competent even against the Father himself, to perform which, therefore, can require no Service, yet, where the Obligation was implemented, as it ought to be, by the Securities taken to the Father himself, and to the Children of the Marriage, as Heirs of Provision, a Service, special or general, *secundum subjectam materiam*, is as essential to vest the Estate in the Children as in any other Case.

And your Lordships will consider what the Consequences would be, if Parents were allowed to take such Liberties with the Provisions of Succession in their Marriage-contracts. Their unlimited Power of Distribution gives them such an Awe-band over their Children, as must necessarily oblige them to submit to whatever Terms the Father is pleased to prescribe. Supposing the Estate to be worth 10,000 *l.* and ten Children, which, if equally divided, would

would yield 1000 *l.* to each Child; the Father having these Children *in familia*, and under his Power, makes his Attack upon them one by one, and easily persuades or concusses them to accept of 100 or 200 *l.* in full. This Game he pursues to the last, no one Child daring to stand out; so that, eventually, instead of 10,000 *l.* he shall not make good above 1000 *l.* to the whole Children, till he comes to the last, who then standing single, needs be under no Apprehension of the Father's arbitrary Power.

The Application of these Principles to the Case in hand is obvious. Here is a Provision of Succession, by Marriage-contract, to the whole Children of that Marriage; one of the two Children is supposed to be forisfiliate, and to have renounced any Claim competent to her, the other Child remains *in familia*, and has not renounced, she thereby becomes the sole Heir, and the whole Provision, so far as not made good to the other Child forisfiliate, must be effectual to her.

In respect whereof, &c.

ALEX. LOCKHART.

M E M O R I A L

F O R

DAVID THREIPLAND-SINCLAIR of *Southdun*, and STUART THREIPLAND of *Fingask*, his Administrator in law, Defenders ;

A G A I N S T

MRS. KATHARINE SINCLAIR, second Daughter of the deceased *David Sinclair* of *Southdun*, by Mrs. *Marjory Dunbar* his second Wife, and *James Sinclair* of *Duran*, her Trustee, Pursuers.

IN the process of declarator at the instance of Mrs. *Katharine Sinclair* and Mr. *Sinclair* of *Duran*, against Mr. *Threipland-Sinclair*, the heir of the estate of *Southdun*, and also against the executors and other representatives of the late *David Sinclair* of *Southdun*, respecting the subjects conquest by him during his second marriage, which are claimed by the pursuers, the Lord *Auchinleck* Ordinary, on the 11th *February* 1767, pronounced this interlocutor: " Having considered the debate, " with the several writings therein referred to, finds, That " Mrs. *Marjory* and *Katharine Sinclairs*, the pursuer's cedents, having been the only children of the marriage between *David Sinclair* of *Southdun* and Mrs. *Marjory Dunbar*, were intitled to " full implement of the provisions to the children of that marriage, in terms of the marriage articles between their parents, " viz. 10,000 merks, and the whole that should be conquest during the marriage ; the conquest being declared to be what " *Southdun* should have at the dissolution of it, over and above " the

“ the land estate he was then posselt of, and after payment of all
 “ debts he was then owing, or should be owing at the dissoluti-
 “ on of the marriage: But finds, that neither of these daugh-
 “ ters was intituled to the aforesaid provision, in respect the fa-
 “ ther, by the conception of the contract, had the power of di-
 “ vision:—And therefore finds, That though in his daughter
 “ *Marjory's* contract of marriage, he settled 10,000 merks up on
 “ her, as her share of the conquest, which was effectual to cut
 “ out *Marjory* and her heirs, who behoved to rest satisfied with
 “ the division he made, he still continued bound to make good
 “ the provisions to the other heir of the marriage, Mrs. *Katharine*
 “ *Sinclair*, so far as Mrs. *Marjory's* share had not exhausted them.—
 “ And before answer to the question, how far Mrs. *Katharine*
 “ was cut out from claiming her share of the provisions, ap-
 “ points her to make distinct and pointed answers to the questi-
 “ ons put to her by the defenders, contained on a paper apart,
 “ and to subscribe her answers, and return them to this process
 “ as soon as may be.”

Against this interlocutor, mutual representations were offered ;
 and Mrs. *Katharine* having also given in, signed by herself, an-
 swers to the defenders condescendence, relative to her acceptance
 of the bond of provision granted to her by her father, in satisfac-
 tion of her claim of conquest, the Lord Ordinary, on the 10th
March 1767, pronounced this other interlocutor: “ Having re-
 “ sumed the consideration of the representation for *David Threip-*
 “ *land*, and his administrator in law, with the foregoing an-
 “ swers, adheres to the former interlocutor, so far as it finds the
 “ sum advanced to Mrs. *Marjory*, do not preclude Mrs. *Katharine*
 “ from claiming effectual implement of the obligation for con-
 “ quest, in so far as not implemented: And further, having con-
 “ sidered the condescendence for the defenders, and Mrs. *Katharine*
 “ *Sinclair's* answers; and, more particularly, having consid-
 “ ered that it is an agreed fact, that Mrs. *Katharine Sinclair*, at
 “ the time of the alledged transaction, was living in family with
 “ her father; that there is no deed under her hand, renouncing
 “ her claim on her mother's contract of marriage; that it is not
 “ alledged that she, after her father's death, ever made any claim
 “ upon this bond, or even, in her father's life, made any claim
 “ upon it; finds, that she is not bound to accept of that bond;
 “ and that her claim, and the pursuer's in her right to the con-
 “ quest,

“quest, in terms of her father and mother’s contract of marriage, remains effectual.”

Against both these interlocutors, the defenders having reclaimed: Upon advising their petition, with answers for the pursuers, upon the 4th of *December* last, your Lordships were pleased to pronounce this interlocutor: “The Lords having advised this petition, with the answers thereto, find Mrs. *Katharine’s* acceptance of the bond of provision, granted to her by *Southdun*, not instructed; and that she is not bound to accept of said bond, neither is she obliged to hold the same in satisfaction of her claim of conquest; and in so far adhere to the Lord Ordinary’s interlocutors reclaimed against; and refuse the desire of this petition. But before answer as to the other point in this petition, *viz.* Whether Mrs. *Marjory’s* renunciation of her share of the conquest must operate a discharge of the one half, and must restrict *Katharine’s* share to the other half, appoints parties to give in memorials thereon, *hinc inde*, betwixt, &c.”

In obedience to your Lordships appointment, this memorial is humbly offered for the defenders, with respect to the above point, still undetermined, which is of considerable consequence to the law of this country, as well as to the parties in this cause. The facts relative to the whole cause were most distinctly stated in the defender’s reclaiming petition: But that your Lordships may have here a view of what relate to this particular point, it will be necessary for the defender to resume them, before entering upon the argument.

David Sinclair of *Southdun* was thrice married. By his first wife, Lady *Janet Sinclair*, whom he married in 1714, he had two daughters, *viz.* *Jean*, the eldest, who married Sir *William Dunbar* of *Westfield*, and died in 1749, leaving an infant daughter, who also died in 1750; and *Janet*, the second, who married *Stuart Threipland* of *Fingask*, and died in 1755, leaving two children, *David Threipland-Sinclair*, the defender, and a daughter, *Janet*.

In 1722, *Southdun* entered into a second marriage with Mrs. *Marjory Dunbar*, daughter of Sir *Robert*, and sister of Sir *Patrick Dunbar* of *Northfield*, by whom he had also two daughters, *Marjory* and *Katharine*. *Marjory*, in 1748, married her cousin *John Dunbar*, son of the said Sir *Patrick Dunbar*, by whom she had no issue; and he dying in 1751, she married *James Sinclair* of *Harpisdale*, by whom she had a son, *George*, now dead, and four daughters,

ters, who survive her, the herself having died in the 1763. *Katherine Southdun's* second daughter of that marriage, is yet unmarried, and is the pursuer in this cause.

In the 1756, *Southdun* entered into a third marriage with Mrs. *Margaret Murray*, by whom he had an only daughter *Margaret*, born in 1758, still living.—*Southdun* himself died in March 1760, leaving his third wife a widow, who is now married to Mr. *John Gibson*.

On occasion of these three different marriages, different settlements were made by *Southdun*; particularly, upon his second marriage with Mrs. *Marjory Dunbar*, he became bound, by contract, to settle her in the life rent of lands, worth 500 merks of yearly rent, and to provide the children of the marriage in the sum of 10,000 merks, "To be divided and distributed among them by their father, with consent of their mother, during their lifetime: and failing such distribution and division, by two of the nearest of kin on the father's side, and two of the mother's side, the eldest son's provision always not under the sum of
 " : All which provisions are to be paid at the first term of *Whitsunday* or *Martynmas* next after the said *David Sinclair's* death, under the penalty of a fifth part of each child's provision, in case of failzie, and the annuallent after the term of payment: with this provision, that notwithstanding of said terms of payment, yet the childrens provisions, according to the distributions and provisions above written, shall not fail due in whole or in part, until their necessary aliment, education, or furniture to any employment, shall require it, or until their marriage or majority: All which the said *David Sinclair*, for clearingness sake, is allowed to explain by a paper under his hand, after the childrens evidence; or failing thereof, to be determined by two of the nearest in kin of the father's side, and by two of the nearest in kin on the mother's side, as above, and in case it shall please the said *David Sinclair*, or his heirs, to pay the said provisions rather in land than in money, then, and in that case, it shall be lawful to the said *David Sinclair*, or his heirs, to dispose in their favours such a part of his estate, in lieu of the said 10,000 merks, as he, and the persons at whose instance execution is allowed to pass, in manner after-mentioned, shall agree: And failing thereof, after his death, by two of the nearest on the father's side,

“ fide, and two on the mother’s fide : And the faid *David Sinclair* binds and obliges him to aliment and educate the children during his lifetime, according to their quality. And whatever lands, heritages, fums of money, or others whatfoever, it fhall happen the faid *David Sinclair* to conquest or acquire, during the marriage, he binds and obliges him to provide and fecure the fame in manner following, *viz.* The one half to the faid *Mrs. Marjory Dunbar* in liferent, for her liferent ufe allenarly, during all the days of her lifetime; and that by and attour her liferent provision above written, and the whole to the children of the marriage in fee, *to be divided among them in manner above mentioned*:—Declaring, that nothing fhall be repute conquest, but what he fhall be worth at the diffolution of the marriage, beyond his present land eftate; and after payment of all his juft and lawful debts, *already contracted*, or to be contracted by him during the marriage; and it is hereby provided and declared, that the free moveables fhall be divided according to law.”

In the 1748, *Mrs. Marjory Sinclair*, *Southdun*’s eldeft daughter of this fecond marriage, having intermarried with her coufin *Mr. John Dunbar*, fon to the faid *Sir Patrick Dunbar*, while her mother, *Southdun*’s fecond wife, was ftill living, a contract of marriage was paffed between them, to which *Sir Patrick* and his fon were the parties on the one fide, and *Southdun* and his daughter on the other. By this contract, *Southdun* “ bound and obliged him, and his heirs and executors, to content and pay, in name of tocher, with his faid daughter, *and as her fhare of the conquest*, to the faid *Sir Patrick Dunbar*, his heirs or affignies, including executors, the fum of 10,000 merks *Scots*,” by equal portions, at the terms of *Martinmas* 1749 and *Martinmas* 1750, with penalty and annualrent of the whole, from *Whitfunday* then next, during the not payment. The fum fo provided was accordingly paid to *Sir Patrick Dunbar*, who, your Lordships will obferve, was the brother of *Southdun*’s fecond Lady, and, upon his father’s death, came to be poffeffed of her duplicate of the marriage contract 1722. *Sir Patrick*, and his fon *John*, were alfo the two neareft of kin to the children of that marriage on the mother’s fide; and being perfectly acquainted with the terms of *Southdun*’s contract 1722, they confidered the

Feb. 24.
1748.

10,000 merks thus advanced in tocher with *Marjory* the eldest, to be a full and ample equivalent for her share of the conquest, provided to her by that contract, especially, as the amount of such conquest, as well as the term when it could be recovered, was altogether precarious and uncertain.

However, the said *John Dunbar* having died soon after his marriage, Mrs. *Marjory* was again married in *September 1751*, to Mr. *Sinclair* of *Harpshale*: when, upon her renouncing the life-rent that had been provided to her by Sir *Patrick Dunbar*, he, Sir *Patrick*, repaid the tocher of 10,000 merks to her, and *Harpshale* her second husband, by whom she had several children, as already observed.

Scathelun's second Lady having died sometime thereafter, and he being about to enter into his third marriage in 1756, it was thought proper, both by *Scathelun* himself and Sir *Patrick Dunbar*, the uncle and nearest relation on the mother's side to the children of the second marriage, that as he had eight years before given a provision to *Marjory* the eldest daughter of that marriage, in satisfaction of her share of the conquest, he should likewise give a bond to *Katherine* the other daughter, and thereby finally acquit himself of the obligation he had come under by his contract 1722, in favours of the children of that marriage.

Accordingly, *Scathelun*, of this date, granted a bond to the said Mrs. *Katherine*, the purtier, for 1000 *l. Sterling*, payable to her, her heirs, &c. at the first term after his death, and became bound in the mean time, to aliment her in his family, and furnish her with cloaths and other necessaries, or, in his option, to pay her 100 *l. Sterling* yearly, to buy such cloaths and necessaries. The bond also bears to be granted by *Scathelun*, and accepted by Mrs. *Katherine*, "in full satisfaction to her of her share of the provisions granted by him in the contract of marriage betwixt him and his said deceased spouse, in favours of the daughters of that marriage, failing heirs male, and in consideration and full satisfaction to her of her share of the provision of conquest of lands and heritages, and others whatsoever, which should be acquired during the marriage, granted by him in favours of the daughters of the said marriage, failing heirs-male: and in consideration and full satisfaction of her portion natural, lawful part of *gna.*" &c. Or all which, and

and of all her other pretensions, except his own good will, and her succession to his estate, if it should fall to her, Mrs. *Katharine*, by her acceptance thereof, was declared to be bound to discharge her said father.

To this bond the said Sir *Patrick Dunbar* and his son-in-law *James Sinclair* of *Duran*, (now Mrs. *Katharine's* trustee) are the instrumentary witnesses. It was delivered to Sir *Patrick*, who put it into the young lady's own hands, and she again returned it to him, by whom it was soon after put upon record; and one extract was paid for, delivered to, and kept by Mrs. *Katharine* herself.

Within two days after granting this bond, *Southdun* entered in- July 27.
to a postnuptial contract with Mrs. *Margaret Murray* his third wife, whereby he, *inter alia*, provided to the heirs-male of that 1756.
last marriage the whole lands and heritable subjects then pertaining to him, including the whole subjects that had been conquest and acquired during his second marriage, and which are now claimed by Mrs. *Katharine*, the pursuer. To this last contract the said Sir *Patrick Dunbar*, the pursuer's uncle, and *James Sinclair* of *Harpsdale*, her brother-in-law, were instrumentary witnesses. From all these facts, it is manifest, that these gentlemen, as well as *Southdun* himself, were then perfectly satisfied, that *Southdun* had fully discharged the obligations of his second contract 1722, and that neither of the two daughters of that marriage could have any further claim upon him for conquest, or otherwise.

However, in the year following, *Southdun* made a voluntary addition to the provision of Mrs. *Marjory*, the eldest daughter of that second marriage. It has been already noticed, that she had several children by *Harpsdale*, her second husband; and although 10,000 merks paid down to her in the 1748, was eventually equal to 18,000 merks provided to the other daughter *Katharine*, at *Southdun's* death, which did not happen till the 1760; yet *Southdun* thought fit, from regard to his eldest daughter and her issue, to give her such an additional provision as should make her capital equal to that of her sister *Katharine*.

Accordingly, *Southdun*, of this date, granted a bond of provi- Sept. 28.
sion in favours of Mrs. *Marjory* and her husband, in conjunct fee 1757.
and liferent, for their liferent uses allennarly, and to their children in fee, for 8,000 merks, payable at the first term of *Whitsunday* or *Martinmas* after his decease, with interest thereafter. This bond proceeds

proceeds upon the narrative of the affection he bore to his daughter: and that the provisions made for the younger children procreate, or to be procreate, betwixt her and *Harpdale*, were too mean; and that he therefore thought proper to add the sum of 8000 merks to their provisions, with the burden of their father and mother's lierent: It likewise declares, "That the said sum of 8000 merks, and the sum of 10,000 merks formerly paid by him to his said daughter in name of tocher, and for her share of the conquest, are granted by him, and accepted by her and her said husband, in full satisfaction to her of her share of the provisions granted by him in the contract of marriage betwixt her deceased mother and him," &c. The bond also contains a dispensation with the delivery, and a reserved power to alter, and was found in *Southden's* repositories at his death.

Your Lordships have had access to hear of the tailzie made by *Southden* in the 1747, and the questions thereby occasioned. The history thereof, and of other matters respecting this family, being already stated in the petition and answers, and not immediately relative to the subject of the present memorial, need not be here repeated.

It is sufficient to observe in this place, that *Southden* having left no issue male of any of his marriages, the succession to that part of his estate which he had contracted to the issue of his first marriage with Lady *Janet Sinclair*, and also of certain other parts of his estate, which he had combined therewith in his tailzie 1747, devolved upon the defender *David Threlphand*, his grandson by *Janet*, his daughter of the first marriage; that *Margery* and *Katharine*, the daughters of the second marriage, were understood to be paid off and provided by the deeds above recited; that *Margaret*, the only child of the third marriage, was, by her mother's contract, provided to a portion of 18,000 merks; that his executry was insufficient to answer the debts affecting it; and that the residue of his heritable subjects falls to his surviving daughters, and the issue of such as are dead, as his *heirs potestates and of him*, subject to *Southden's* debts, so far as not cleared out of the executry.

But Mrs. *Katharine*, the surviving daughter of the second marriage, in concurrence with a trustee for the children of her sister *Margery*, have thought fit to set up a separate claim to such lands, and other subjects, as appear to have been conquest and acquired by

by *Southdun* during the subsistence of his second marriage, and which is now the subject of the present action. How far such a claim, even though successful, will be beneficial to them, or whether Mrs. *Katharine* would not be a greater gainer by taking her 18,000 merks in full, as *Southdun's* debts are very considerable, is altogether uncertain. But as the sustaining such a claim must involve the parties in much litigation as to the extent of the debts affecting the conquest, the defenders made these objections against it, *1mo*, That Mrs. *Marjory* had accepted, at her marriage, of a portion in full of her share of the conquest; and that Mrs. *Katharine* had also accepted of the bond of provision granted by her father to her, in satisfaction of any such claim. And, *2do*, That supposing Mrs. *Katharine* had not accepted of the said bond; yet she could only claim the one half of the conquest, subject to the debts affecting the same, in respect that her sister *Marjory*, who survived her mother, and was intitled to the other half, had discharged her father thereof.

The defender and his father were very much disposed to have had these points adjusted by arbitration, and accordingly did agree to a submission: But that submission was rendered abortive, by the pursuer's positively insisting, that the arbiters should have no power to take the above points of law under their consideration, but that, holding the pursuer's right to the whole conquest as good, the arbiters should only have power to ascertain the extent of the debts affecting the same. The pursuers, thus insisting for the defenders giving up their legal objections to the claim, as a preliminary article, necessarily put an end to the submission; and the pursuers have since proceeded, in their declaratory action respecting their right to the said conquest, as the defenders have likewise done in their counter-declarator, for having it found, that the said claim of conquest was fully satisfied, and that the conquest lands must now belong to *Southdun's heirs portioners of line*, subject to the payment and relief of debts.

Your Lordships have, by the above recited interlocutor, determined the first point, as to Mrs. *Katharine's* acceptance of her father's bond of provision; and as that part of the interlocutor has not been reclaimed against, it must be here held, that her claim is not barred by the said bond, which she has not accepted of; and, consequently, that she may still insist upon her right under the clause of conquest contained in her father and mother's

contract of marriage. It remains to be considered, how far that right does extend, and whether she is intitled to the whole conquest, so far as not exhausted by what was paid to her sister *Marjory*; or if she can only be intitled to the one half, in respect of *Marjory's* acceptance of a sum from her father in full of her share.

In considering this point, it seems proper to begin with establishing, that *Marjory*, the elder sister, did in fact accept of a sum in satisfaction of her share of conquest, and renounced her claim thereto in his favour, as the pursuers were pleased to throw out some insinuations to the contrary, although they have not hitherto directly disputed it.

Indeed, the words of Mrs. *Marjory's* contract of marriage are, *per se*, full and irrefragable evidence of the fact. *Saukdan* thereby became bound to pay to Sir *Patrick Dunbar* the sum of 10,000 merks, in name of tocher with his said daughter, and as her share of the conquest. It is impossible to dispute, that by these words was meant her share of the conquest provided by her mother's contract of marriage. There was no other conquest to which *Marjory* had the least claim or pretension; and Sir *Patrick Dunbar*, her uncle, to whom this very sum was payable, was her mother's brother, and possessed of her duplicate of the contract. There cannot be the smallest doubt, that both parties meant and understood, that this sum was given and received in full satisfaction of all claim of conquest that was or might be competent to *Marjory* under that contract. As little can it be doubted, that *Marjory* was thereby held to discharge her father of such claim, or to renounce the same in his favour. It was not, indeed, thought necessary to express such discharge and renunciation in such full terms as those sometimes made use of; but her and her husband's acceptance of a specific sum as her share of the conquest, did sufficiently imply her renouncing all further claim thereupon, and would have founded *Saukdan* in an action against her, to have compelled her to grant the most formal discharge, renunciation, or attestation in his favour, had the same been requisite, as it was not. And *Saukdan's* afterwards settling the very conquest subject, by his third marriage contract, upon the her, made of that marriage, demonstrates, that he then considered the claim of *Marjory*, as well as of *Katharine*, to any part of those

those subjects, to have been then fully discharged and extinguished.

The pursuers have indeed observed, that by the clause contained in the bond, which *Southdun*, after his third marriage, granted to *Marjory* for 8000 merks, "providing, that the same, with 10,000 merks formerly given to her as tocher, should be in full of all she could claim under her mother's contract, or as conquest, portion natural, &c."—It appears, that *Southdun* did not understand that *Marjory* was *previously* excluded from these her legal claims, by the tocher given her at her own marriage; and that, if she was not excluded thereby, as little would she or her children be so by the said bond for 8000 merks, which never was accepted of.

But this objection is already obviated, by the recital above given of the narrative of the 8000 merks bond. It clearly proves, that *Southdun* granted the same to *Marjory*, not as a matter of right, but merely *ex gratia*; and in regard of the provisions which her husband was able to make for her children being too mean. The after clause referred to by the pursuers, was probably copied from the like declaration in the bond, which had been previously granted to her sister *Katharine*; and the ignorance or inattention of the writer of the last bond, is manifest from this, that the sums in it are all expressed in figures, instead of being wrote fully in words. Besides, if this clause was truly attended to at the time, it might have been thought proper to throw it in, to obviate any pretence that *Southdun's* making a further provision, for *Marjory*, imported a passing from the discharge and renunciation, formerly granted by her in her own marriage contract; and, at any rate, the superfluity of stile, for making *Marjory's* discharge in the subsequent bond broader than it was necessary, cannot possibly impair the *jus quæsitum* to *Southdun*, by her accepting of a sum in full at the time of her marriage; especially, when the former payment, and the acceptance of 10,000 merks for her share of the conquest, is expressly mentioned in the 8000 merks bond. It matters not, therefore, whether she accepted of the bond or not, for still, independent of it, her father was fully and absolutely discharged at her hands. And indeed, your Lordships seem to have been fully satisfied on this point, of *Marjory's* having renounced her share of the conquest in her father's favour, as appears from the very words of your Lordships last interlocu-

interlocutor, appointing memorials on the question, "Whether Mrs. *Majory's* renunciation of her share of the conquest, must operate a discharge of the one half, and must restrict *Katharine's* share to the other half?" and by the Lord Ordinary's interlocutor, acquiesced in by the pursuer, *Majory's* claim to any more of the conquest stands totally excluded.

Having thus cleared the way, and established the fact, that Mrs. *Majory* did accept of a sum in full, and renounced her claim to a share of the conquest, the point of law stated in your Lordships' interlocutor comes now to be considered neat and entire.

In treating of this point, the defenders have no occasion to resort to the civil law, which does not coincide with the rules of the law of *Scotland* in this particular. The *lex Aneffiana*, and the *ius auctoritatis*, do not take place in this matter. The clause of conquest in *Southkai's* second contract, can neither be justly considered in the light of a legacy, nor as a provision of succession to two persons conjunctly, so as to have the effect, upon the renunciation or failure of the one of them, to make the whole accrete to the other. It is much more than a provision of succession; for, by the law of *Scotland*, the children, in whose favours such a clause of conquest is made, are from their very existence, creditors to their father, the obligee in that clause, although its operation, or the ascertaining the amount of the provision, may be suspended till the dissolution of the marriage. Hence, if one of several children entitled to a share of such provision, should happen to die, leaving issue, the share of such child would not accrete to the surviving children, as in the case of legitim, but would unquestionably transmit to the lawful issue of such child, who may insist for implement *pro* creditors, even without the aid or formality of a service. Upon the same principle it is, that although a father is understood to have the free and absolute disposal of his means and estate, without challenge from those entitled to take the succession, merely as heirs to him; yet he cannot exonerate or disappoint, by deeds merely gratuitous, such a provision as this, made in his own marriage contract, in favour of the children of such marriage.

It is thus clear and undisputable, that although in making up titles under such a clause, children may be considered, *quasi* third parties, as heirs of provision; yet, *quod* their father, they are not mere donees or legatees, but are creditors, in the true and proper sense of

of the word, even *stante matrimonio*. As then there was here a true and proper debt due to two children by their father, it seems impossible to figure any solid reason, why the father should not be in the same situation, with respect to them, as any other debtor would have been, or as if he had been under the like obligation to any other two persons. Nothing can hinder a debtor under such obligation, to agree with one of the creditors, respecting the share appertaining to that one; and the defenders can discover no ground in law for defeating such contract, or transferring the whole benefit thereof from the debtor to the other co-creditor. It is acknowledged, that he may freely contract, and obtain the discharge of both; and that if he does so, nothing more will be due: Why, then, should he not be at equal freedom to contract with the one for a proportional part, especially, when it is admitted, that the party contracting is under no restraint, but may, *ad libitum*, convey the same, by assignation, to another person, or may transmit it by succession to heirs, or may render it subject to debts or other contractions? It must, surely, appear extraordinary doctrine, that a child may freely sell, or assign to a stranger, may contract to a third party, or transmit to his heirs; and yet, that such child cannot grant an effectual discharge, or conveyance, to his father, of that very debt due by the father, and over which the child has such free and unlimited powers.

If, then, a child, who is creditor in such a provision of conquest, can validly assign, or convey to the father, debtor in that provision, such child's share or interest therein, there cannot, with submission, be the least room for doubt, that if, instead of an assignation, a child shall grant a discharge, or renunciation of such share, it must be as effectual to the father, and exclusive of any pretensions of the other children to any part of the share, so renounced or discharged, as if a formal assignation or conveyance had been granted. As the father stood debtor in the provision, the discharge, or renunciation, is a total acquittance and extinction to him, the debtor, of the claim of every mortal, to any part of that share. An assignation to the proper debtor is unnecessary; or if it should be thought necessary, the renunciation implies in it a conveyance to the debtor of every right in the granter, competent or requisite for making such discharge effectual, and barring the claim of any other person. This is the rational and legal effect of such a renunciation in a common case;

and as *actus agentium non operantur ultra eorum intentionem*, it seems impossible to dispute, either that this renunciation must be fully effectual to the debtor who obtained it, or that it cannot operate in favour of another creditor, for whom no earthly benefit was thereby intended.

Ch. 1. It has been observed, and seems to have had weight with the Lord Ordinary, that as *Southden* had, by the contract 1722, the power of distributing the conquest, so, by providing the eldest daughter *Margery* to 15,000 marks as her share, he did, in effect, only exercise that power of division, and consequently, remained liable to the other daughter for the residue, even although a discharge or assignation, procured by him from *Margery*, might have, in law, been effectual to extinguish the one half, and debar *Katharine* from claiming more than the other. But to this objection, various answers have occurred, which, it is hoped, will be jointly, or even separately conclusive and satisfactory to your Lordships.

Ch. 2. In the first place, it will be noticed, that although the Lord Ordinary's interlocutor, in favour of Mrs. *Katharine's* claim to the conquest, so far as not exhausted by what *Southden* had paid to her sister, was expressly put upon this medium, of *Southden's* power of division, and his presumed intention of exercising that power, when he provided *Margery* to a certain portion: yet the pursuers themselves, in their answers to the defenders reclaiming petition, drawn by a most eminent council, did not chuse to put their plea upon that footing. They did not even offer a single argument in support of such a presumption, as that *Southden* meant, when providing *Margery*, to exercise his power of division, but rested their plea upon this abstract point, that the effect of a father's obtaining a discharge or renunciation from one of several children entitled to take under a provision of conquest, was, that the surplus of that child's share should accree, not to the father, but to the other child or children who had not discharged him. The defenders may therefore fairly conclude, that the pursuers themselves were thoroughly convinced, that *Southden* did not mean to exercise any power of division, when he transacted with his daughter *Margery*, and obtained her renunciation of her share.

Ch. 3. 2dly, Where a father, having such a power of division, does truly mean to exercise it, the deed by him done to that effect, does always express, that it is done in pursuance and execution of such

powers. Mrs. *Marjory's* contract bears no such expression; but, on the contrary, the words and circumstances of it must afford conviction, that neither more nor less was thereby intended, than her father's giving her a sum of money, and obtaining a discharge and renunciation in his favours of her half, or rateable proportion of the conquest, as the same might be afterwards ascertained. Were this doubtful, which it is thought not to be, the rule of law, and of reason, would apply, that *debitor non presumitur donare*: And as *Southdun* was undoubtedly debtor to *Marjory* in a half, he must be presumed to have liberated himself from that obligation, and not to have transacted with *Marjory*, merely to transfer her claim to the surplus to her sister *Katharine*.

3^{to}, It is evident, that *Southdun* had no partiality for *Katharine* Ans. 3. in preference to *Marjory*, but rather the reverse: For although *Marjory's* tocher of 10,000 merks, paid down in the 1748, was rather more than equivalent to the 18,000 merks which he afterwards provided to *Katharine*, payable only at his death, which happened in the 1760; yet, from compassionate regard to the numerous issue of *Marjory*, he voluntarily added 8000 merks more to her provision; and thereby made their capitals nominally the same, though that of *Marjory* was substantially the greater. And when to this is added, that after the transaction with *Marjory* for the 10,000 merks, and the granting bond to *Katharine* for the 18,000, in full also of her claim, *Southdun* settled upon the issue male of his third marriage the very conquest lands to which these daughters would have been intitled, if their claim was not released and extinguished, there arises full conviction, that *Southdun*, when contracting with *Marjory*, had not intended a partial exercise of his distributive power, but the obtaining to himself an ample discharge of her right to the one half of this conquest.

And, 4^{to}, *Southdun* can never be presumed to have done, or in- Ans. 4. tended what he had clearly no power of doing, namely, the making by himself a partial distribution of the conquest between his two daughters. By his marriage contract 1722, already recited, the 10,000 merks specially provided to the children of the marriage, was to be divided among them "by their father, with consent of their mother; and failing such distribution or division, by two of the nearest of kin on the father's side, and two of the mother's side;" the provisions to be paid at the first term of *Whitsunday* or *Martinmas* after *Southdun's* death, with annual rent there-

thereafter; and the contract bears, that the conquest also provided to the children, was "to be divided among them in manner above mentioned." *Southden's* second wife was alive at the marriage of her daughter *Marjory*, and lived some years thereafter; and as there was no party with *Southden* to *Marjory's* contract of marriage, it can never be supposed, that *Southden* could by his transaction with *Marjory* in that contract, mean to exercise a power of division, which he must have known was utterly incompetent to him, without the concurrence of his wife, although he might, by himself, purchase or procure from the children, a discharge or renunciation in his own favour of that provision, in which they respectively stood creditors to him.

Nor does any objection to this conclusive argument arise from the inaccurate expression of the said contract 1722, whereby it may be supposed, that, upon the death of the mother, the power of distribution was devolved upon two of the nearest in kin on each side, and might be even exercised by them after the death of *Southden* himself. For the defenders apprehend, that the powers of the nearest in kin, must be held as limited to the supplying the place of the wife during *Southden's* own life; at least, that they were bound to execute such power immediately on his death, as the portions were made payable at the first term thereafter. It would be extraordinary indeed, if, even posterior to that term, and much more, if, at this day, those next in kin could cut and carve upon this conquest, which, in so far as not discharged, did, at *Southden's* death, devolve upon his children *pro rata*. Such a power would be plainly adverse to reason, practice, and expediency; and is likewise excluded by this circumstance, that the nearest of kin who existed either at the dissolution of the marriage, or at *Southden's* death, never attempted such a distribution, but are dead and gone; and their supposed power certainly could not transmit to their heirs, or pass to the next of kin *ad infinitum*.

But as no danger can now be apprehended from that power given to the next of kin; so it is sufficient for the present argument, that as either their consent, or that of the lady, was requisite to any division made by *Southden* himself, his singly contracting with *Marjory* for a renunciation of her share, without the concurrence of his lady, or of any person whatever, cannot possibly be held as an exercise of that power, but as a just and proper

per transaction between the debtor and creditor, whereby the latter did discharge the former of her half or share of the conquest, whatever the same might eventually turn out to be. No consent was necessary to a transaction of this kind: *Marjory* could have effectually conveyed her share to a husband, or to a stranger; and therefore she did effectually transfer it to her father, with the approbation of her own husband, and of his father Sir *Patrick Dunbar*, who was thoroughly acquainted with, and chiefly interested, in the performance of this obligation or provision of conquest.

The pursuers holding *Southdun's* intention to have been such as Object 2. the defenders contend for, have chiefly insisted upon this other ground, that the clause of conquest being a provision not of a special sum to each child, but of a precarious subject *familie*, or to the whole *pro indiviso*, all and each of the children had a right to every part thereof, so far as not actually paid, or given away to them: That therefore the obtaining a discharge from any one can only have the like effect as if the granter were naturally dead, so that the residue must accrete to the survivors, or those who have not discharged, according to the rule in the case of legitim; and that the giving a stronger effect to such discharge might open a door to a father's using concussion, or other undue means, for compelling his children to discharge him *seriatim*, and so defeat a provision by contract in their favours.

But the defenders, with great submission, apprehend that there Answer. is no solid ground for any distinction, in this respect, between sums specially provided to children, and a general clause of conquest. The latter does not create merely a *spes successionis*, but does as well as the former vest in the children, even *stante matrimonio*, a *jus crediti*, which their father cannot fraudulently disappoint. One of the children, therefore, who eventually survives the dissolution of the marriage, as *Marjory* here did, and who is of age and capacity, may as effectually transact upon, discharge, sell, or convey her share of each general provision, as if it was a specific sum settled upon her; and the person to whom she makes over her title, must, when its extent comes to be ascertained, have the same right which she or her heirs would have otherwise had: Nor is there cause for apprehending any danger, from the father's being at liberty to transact with a child, on this footing, more than from his arbitrary power of distribution; for, as under this power, he might give all to a trifle to one child, so, if he purchases

Charles discharges from all but one, he cannot deprive that one of a reasonable proportion, if no discharge or conveyance is obtained from him. The hardship would be much greater on the other side, if a father, who was debtor in such an obligation, should be in a worse case than any other debtor owing a sum to several persons, by being disabled from purchasing a discharge from one or more of these creditors, for their respective interests, unless he can obtain an acquittance from the whole.

And with regard to the further's argument, drawn from the rule obtaining in the case of *legitim*, it was fully obviated in the defender's petition: and as your Lordships seemed to be all satisfied, that it did not apply to the present case, it is unnecessary to enlarge upon it. The solid distinction lies in this, that *legitim* is a legal right competent to the children *in familia*, to a certain share of the moveables belonging to their father at his death. This right has no existence till that event happen. If, before that event, one of several children is forisfamiliated, or renounces his share, the effect thereof is to hold such child as dead, or withdrawn: death and forisfamiliation being tantamount as to the *legitim*. Nor can a child convey to the father a right which does not exist at the time, and which is not a debt due by the father. Children must be existing, *tantum liberi in potestate*, at the period when the right of *legitim* does arise, in order to be intitled thereto: and such as are dead, or forisfamiliated at that period, can have no concern therein. Consequently, the whole right of *legitim* must devolve on such as are *in potestate*: and, when it does devolve, they may effectually discharge or renounce their shares in favour of their father's executor, as was found in the case of *Charles Henderson's Children* in *June 1728*. But, on the other hand, a provision of conquest in the marriage contract, is, *ab initio*, a true and proper debt due by the father to the children, arising from his express obligation: and, consequently, if any of them discharge or renounce their shares in his favour, he must be entitled to draw or retain that part which would have been eventually due to that child, in whose right of the debt he is thus legally substituted.

It remains only to state a decision upon this point, suggested by one of your Lordships, and the circumstances of which have been discovered by the defenders, after much pains and search
both

both here and at *London*, where the cause was carried by appeal.

John Allardice merchant in *Aberdeen*, by his marriage contract in 1683, with *Agnes Mercer* his first wife, besides the sum of 6000 merks to be secured to the heirs of the marriage, came under this mutual obligation, "That whatsoever lands, heritages, debts, sums of money, and others, it shall happen either of the said parties to conquest, acquire, or succeed to, during the time of the said marriage, the heirs of the marriage shall succeed thereto *in integrum*." A power was also given to the husband of dividing these provisions among his children.

The said *Agnes Mercer*, the wife, died in 1700, leaving issue, one son *John*, and two daughters; at which time the husband's free estate was said to be about 18,000 *l. Scots*.

In the 1703, the said *John Allardice*, the father, entered into a second marriage with *Jean Smart*; and, by marriage contract, became bound to settle 15,000 merks of his own, with 7000 merks, being the wife's portion, to the children of that marriage in fee; and also, to provide to them the whole lands, &c. that he should conquest, or acquire, during the marriage.

John Allardice bestowed 10,000 merks on *John* his son, of the first marriage, without obtaining any discharge from him; and to each of the two daughters of that marriage he gave 4000 merks; and they, in their marriage contracts, accepted thereof in full of all they could respectively claim by their mother's contract.

John Allardice, the father, died in 1718, leaving his second wife a widow, with nine infant children of that second marriage. To the four sons of that marriage he, by his will, devised 6000 merks each, and to the five daughters 4000 merks each, being in all 46,000 merks.

Upon this event, *John*, the son of the first marriage, brought an action in this court against the widow and children of the second marriage, as representing his father, upon this medium, that by his mother's contract his father had provided the whole conquest made during that first marriage, to the heirs thereof: That his father's free estate, at the dissolution of the marriage, amounted to about 18,000 *l. Scots*, and that he the pursuer was intitled to the whole thereof, as conquest, deducing only the 8000 merks paid to his two sisters, who had discharged their father.

The defendants answered, that the father's estate, at dissolution of the first marriage, was not so considerable as alledged: But supposing it to be so, the pursuer could claim no more than a third share thereof, it being provided to the heirs of the marriage: and there being three children of that marriage, the same would, by the contract, be equally divided among them. That the pursuer had already received more than his third; and although the father had agreed with the two daughters, and obtained their discharge for a smaller sum than their third shares, yet the pursuer could not claim any benefit thereby.

After sundry proceedings, which need not be resumed, and other points being debated that do not apply to this case, the Lords, on the 16th *February* 1720, *inter alia*, " Found, That the provisions in favour of the heirs of the first marriage, are to be understood in favour of the children of the marriage, of which there being three in number, and two of them having accepted of special sums from their father, in satisfaction of all they could claim in virtue of the said contract, the pursuer was only intitled to claim a third share of these provisions."

Against this interlocutor, *John Allister* the pursuer reclaimed, and on which a hearing in presence was appointed: And the Lords, upon the 14th *July* 1720, " Found, That the two daughters of the first marriage having accepted of provisions in their contracts of marriage, in satisfaction of all that could fall to them by their mother's contract: which provisions being less than would have fallen to them, as two of three children of the first marriage, supposing that all the children of that marriage were intitled to an equal share, the superplus of the two thirds more than the provisions received, did not accesse to the son of the said marriage, but was at the father's free disposal." And, before answer as to the point, Whether the provision to the *heir* of the marriage, intitled the son to the whole, or divided among the three children? the Lords appointed the chancery records to be directed as to the remains of heirs under such provisions, of sums of money, or movables. And upon a report from the chancery, their Lordships, on the 10th of *January* 1721, " Found, That the three children of the first marriage had an equal interest in the provisions contained in their mother's contract of marriage."

Against these interlocutors, *John Allister* took an appeal: and, in the subsequent case, one of the reasons of appeal is stated

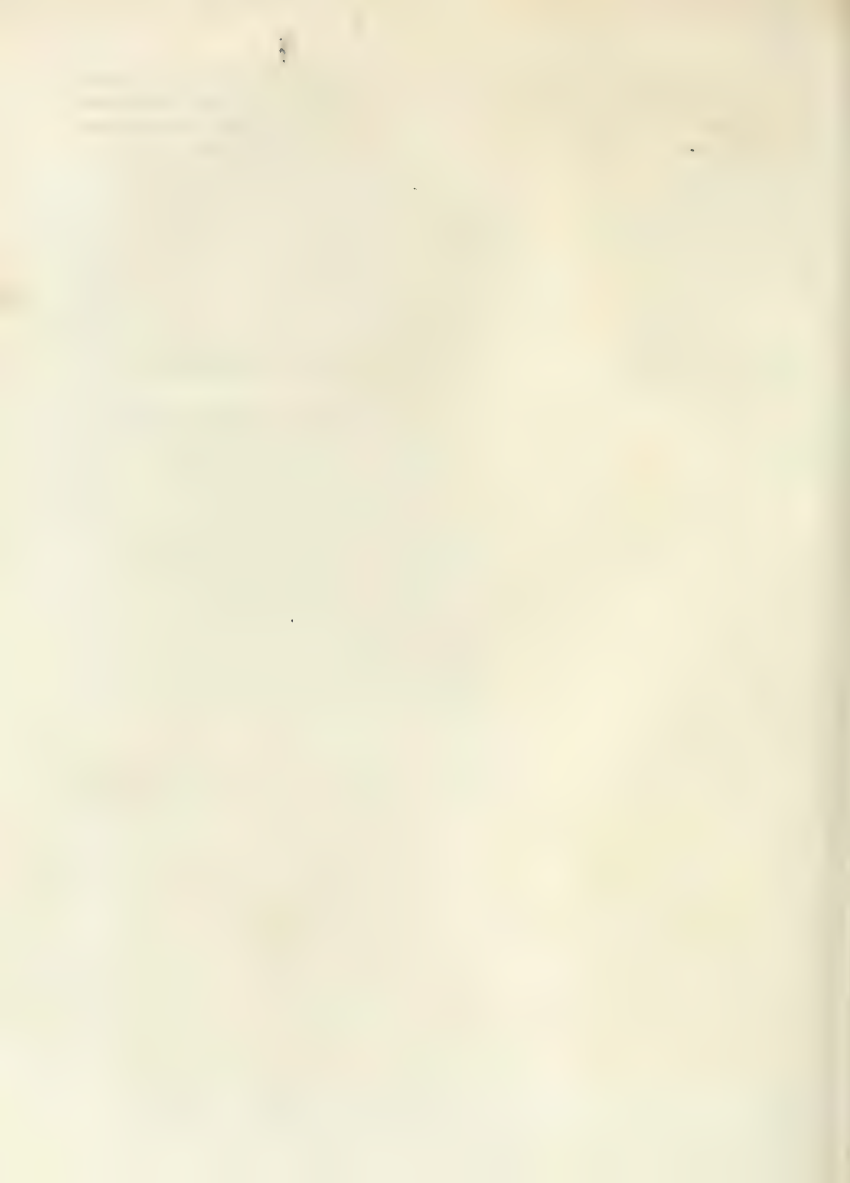
in these words: " That if all the children were to succeed equally, yet the father had the power of division; and he having given 4000 merks to each of his daughters, and which they accepted, in full of what they could claim by their mother's marriage contract, that could only be construed to be an appointment to each of them, of a particular share of the conquest, leaving the residue to the appellant, who properly is the only heir of the marriage; for otherwise, the clause in the marriage articles could not be pursued, since the conquest would not descend to the children of the marriage: And this seems to have been the father's intention, since he only took releases from his daughters, but no assignment to their proportions."

To which it was answered for the respondent, " That the father being the person bound to apply the conquest to the children of that marriage, he might discharge that obligation the best way he could do, to the satisfaction of the parties; and as he was the debtor, whatever advantage is obtained by any transaction, must be to the use of the father, for he must be presumed, rather to discharge himself, than acquire any right to another. The two sisters were then intitled each of them to a third share, the father agrees with them for a less sum, that must, and can only be to the benefit of the father, who was their debtor.—Nor could there be any occasion for an assignment to the daughters shares, for the father being debtor, the release extinguished the debt, &c."

The cause was argued by council for two days, and the house of Lords upon the 12th of *February* 1721, dismissed the appeal, and " ordered and adjudged, that the interlocutory sentences or decrees therein complained of, be, and are hereby affirmed."

The defenders, in the present cause, have obtained certified copies of the cases in the house of Lords, from which the preceding abstract is taken, and also of the decree, which have been shown to the other party; and as it appears to them, that the case is exactly in point to the present, agreeing in every circumstance that is in the least material, they can have no doubt of its removing every difficulty with your Lordships, and producing a like judgment upon the point of law in their favour.

In respect whereof, &c.



JANUARY 21st, 1768.

MEMORIAL

FOR

Mrs. *Katharine Sinclair*, lawful Daughter of the deceased *David Sinclair* of *Southdun*, of his second Marriage, and *James Sinclair* of *Duran*, her Trustee,

A G A I N S T

David Threipland, only Son procreate of the Marriage betwixt Dr. *Stewart Threipland* of *Fingask*, and Mrs. *Janet Sinclair*, lawful Daughter of the said *David Sinclair*, by his first Wife, and his said Father, as Administrator-in-law for him.

IN the Procefs depending between the said *David Threipland* and his Administrator in Law, on the one Part, and *James Sinclair* of *Duran*, Trustee for the Memorialist Mrs. *Katharine Sinclair*, and the deceased *George-Marjory Sinclair*, only Son of the also deceased *Marjory Sinclair*, on the other Part, Lord *Auchinleck*, Ordinary, pronounced the following Interlocutor, to which he adhered, on advising Representations and Answers : “ The Lord February 11, 1767.
“ Ordinary having considered the Debate, with the several Writings
“ therein referred to, finds, That Mrs. *Marjory* and *Katharine Sinclair*, the Pursuers Cedents, having been the only Children of the
“ Marriage between *David Sinclair* of *Southdun*, and Mrs. *Marjory Dunbar*, were intitled to full Implement of the Provisions to the
“ Children of that Marriage, in terms of the Marriage-articles between their Parents, viz. 10,000 Merks, and the whole that
“ should be conquest during the Marriage, the Conquest being
A. “ declared

“ declared to be what *Southan* should have at the Dissolution of it, over and above the Land-estate he was then possessed of, and after Payment of all Debts he was then owing, or should be owing, at the Dissolution of the Marriage; but finds, that neither of these Daughters was intitled of the foresaid Provision, in respect the Father, by the Conception of the Contract, had the Power of Division; and therefore finds, That, though in his Daughter *Marjory's* Contract of Marriage, he settled 10,000 Merks upon her, as her Share of the Conquest, which was effectual to cut out *Marjory* and her Heirs, who behaved to rest satisfied with the Division he made, he still continued bound to make good the Provisions to the other Heir of the Marriage, Mrs. *Katharine*, so far as Mrs. *Marjory's* Share had not exhausted them, &c.”

On advising a Petition for *David Threipland-Sinclair*, and his Administrator-in-law, reclaiming against the said Interlocutor, with Answers for the Memorialist, your Lordships were pleased, of this Date, to pronounce the following Interlocutor: “ The

“ Lords, having advised this Petition, with the Answers thereto, find Mrs. *Katharine's* Acceptance of the Bond of Provision granted to her by *Southan* not instructed, and that she is not bound to accept of said Bond, neither is she obliged to hold the same in satisfaction of her Claim to Conquest, and, in so far, adhere to the Lord Ordinary's Interlocutors reclaimed against, and refuse the Desire of this Petition.—But, before Answer, as to the other Point in this Petition, viz. Whether Mrs. *Marjory's* Renunciation of her Share of the Conquest must operate a *Discharge of the one Half*, and must restrict *Katharine's* Share to the other Half, appoint Parties to give in Memorials thereon, *hereunto, &c.*”

This Memorial, therefore, is humbly offered on the Part of Mrs. *Katharine Sinclair*, and her Trustee; and as the Facts were fully laid before the Court in the Petition and Answers intended to be returned with these Memorials, it will only be necessary to state those Clauses of the several Deeds produced, which seem most pertinent to the present Question.

By Marriage-Contract concluded between the Memorialist's deceased Father, *David Sinclair*, of *Southan*, and her Mother Mrs. *Marjory Sinclair* his first Wife, also deceased, “ the said *David*

“ do hereby bind and oblige him and his forefairs, to provide, se-

“cure, and make Payment to the *Children* of the Marriage, the Sum of 10,000 Merks, to be divided and distributed among them by *their Father*, with Consent of *their Mother*, during *their Lifetime*, and, failing such Distribution or Division, by *two of the nearest of Kin on the Father's Side*, and *two of the Mother's Side*.—And whatever Lands, Heritages, Sums of Money, or others whatsoever, it shall happen the said *David Sinclair* to conquest or acquire during the Marriage, he binds and obliges him to provide and secure the same in Manner following, viz. the one Half to the said *Mrs. Marjory Dunbar* in Liferent, for her Liferent-use allenarly, during all the Days of her Lifetime, (and that by and attour her Liferent-provision above written) and the whole to the *Children of the Marriage* in Fee, to be divided among them in manner above written, declaring, that nothing shall be reputed Conquest, but what he shall be worth at the Dissolution of the Marriage, beyond his present Land-estate, and after Payment of all his just and lawful Debts already contracted or to be contracted by him, during the Marriage.”

Of this Marriage issued two Daughters, the Memorialist *Katharine*, and *Marjory* deceased.

In 1748, *Marjory* married *John*, Son of *Sir Patrick Dunbar* of *Northfield*, and, by Marriage-articles concluded on that Occasion, the said *David Sinclair* of *Southdun* binds and obliges him, and his Heirs and Executors, to content and pay, in name of *Tocher* with his said Daughter, and as her Share of the Conquest, to the said *Sir Patrick Dunbar*, his Heirs or Assignees, including Executors, the Sum of 10,000 Merks, at the Terms therein mentioned.”

This Contract does not refer to *Southdun's* own Marriage-articles 1722 aforesaid, or explain what was therein intended by the Words *as her Share of the Conquest*, or contain any Clause by which *Mrs. Marjory* discharged her Father of all she could claim through his Death, or bear, that the foresaid Provision was accepted in lieu and full of the Provisions of Conquest, and others competent to her under her Mother's Marriage-contract; much less does it assign *Southdun* to all or any thing which she could ask or crave under that Contract, but all which appears is, that the six Words above recited, unexplained and indeterminate, were thrown into the Deed, and their Meaning and Effect is left to be determined or guessed by Conjecture.

Sept. 1sth,
1757.

Southdon's Marriage with Mrs. *Marjory Dunbar* dissolved by her Death in 1755, and in 1757 he executed a Bond of Provision for the Sum of 8000 Merks, payable at the first Term of *Whitsunday* or *Martinmas* after his Death, in favour of Mrs. *Marjory*, and her second Husband, *James Sinclair of Harpsdale*, (whom she had married after Mr. *Dunbar's* Death,) in Conjunct-fee and Liferent, and to the Child or Children, Male or Female, procreate or to be procreate between them, in Fee, divisible in the Proportions therein mentioned. This Bond proceeds on the Narrative, that the Provisions made for the Children procreated, or to be procreated between her and *Harpsdale*, were too mean, and that therefore he thought proper to add the Sum of 8000 Merks to them; and it further contains a very ample Clause, declaring, "That said Sum of 8000 Merks, and the Sum of 10,000 Merks, formerly paid by him to his said Daughter, in name of Tocher, and for her Share of the Conquest, are granted by him, and accepted by her and her said Husband, in full Satisfaction to her of her Share of the Provisions granted by him in the Contract of Marriage betwixt her deceased Mother and him, in favour of the *Daughters* of the Marriage, failing *Heirs-male*, and in full Satisfaction to her of the Provision of Conquest of Lands and Heritages whatsoever, which should be acquired by him during the Marriage, granted by him in favour of the said *Daughters*, failing *Heirs-male*, and in full Satisfaction to her of her Portion-natural, Bairns Part of Gear, Share of Moveables, Legitim, or other Pretensions whatsoever, which she, as one of the only *Daughters* or Children of said Marriage, can in any ways ask, claim, or pretend Right to, by or through her said Mother's Decease, or his, the said *David Sinclair's*, Decease, excepting his own Good-will alienarly, and her Succession to his Estate, if the same should fall to her by Right of Blood, or any Settlement made or to be made by him."

This Bond was found in *Southdon's* Repositories after his Death, and as it was never delivered or accepted by the Parties, and was executed after the Dissolution of his second Marriage, it falls to be laid out of the question, on which it can have no Influence, farther than it may afford Evidence of the Sense and Understanding *Southdon* himself entertained concerning the Import and Effect of the other Deeds.

During *Southdon's* Marriage with Mrs. *Marjory Dunbar*, he conquest and acquired a Variety of heritable Subjects, particularly the

the Lands and Estate of *Dun*, some Houses in the Town of *Thurso*, a Wadset of the Lands of *Latheronwheel*, redeemable on Payment of 20,000 Merks, and a Wadset of the Lands of *West Canisby*, which Subjects did therefore belong and devolve to the Memorialist and her deceased Sister, the only Children of that Marriage, subject to the Burden of Debts imposed upon them, and they have been served Heirs of Conquest and Provision accordingly.

But *David Threipland*, the Heir of *Southdun's* first Marriage, who shall in the Sequel be called the *Petitioner*, not contented with the opulent Succession to which he hath been preferred before the Memorialist, and others, who were equally Heirs-portioners as much as he, hath brought a *Reduction* of their Service in the Character of one of *Southdun's* Heirs of Line, and imagining Mrs. *Marjory*, the eldest, was totally excluded from any farther Share of these Conquest-subjects, he hath, *inter alia*, insisted, in his said Petition, that the Memorialist's Claim must be restricted to the *Half* of them; for that the foresaid Provision of 10,000 Merks, given with *Marjory*, at her Marriage, *in name of Tocher, and as her Share of the Conquest*, was equivalent to a Discharge, formally granted by her, of a *Half*, and had the Effect to make that *Half* *acresce* to *Southdun* or his *Heirs-general*; and therefore that the Memorialist could take no more than the *other Half* which remained.

It is upon this Point that your Lordships have ordered Memorials, and the Memorialist shall endeavour to satisfy your Lordships that the Exclusion or Renunciation of *Marjory* does not operate a Discharge of a *Half* of the Provisions stipulated for her and her Sister, and that the Memorialist's Claim cannot be restricted to the *other Half*, but that she is intitled to draw all which was not actually appropriated or drawn by *Marjory*.

In the general, it will not be disputed, that a Father, obliged by Marriage-contract to give certain Provisions to the *Issue* of the Marriage, is bound *fully* to make good those Provisions to them.

Marjory's Renunciation or Discharge neither did nor could extend to a Half,

In this View, the Petitioner has contended in most strenuous Terms, and his Argument is wholly built upon it, that the Father is considered to be *Debtor* to his Children: But it is equally indisputable, that, in Cases like the present, in which a Power of Division is expressly lodged either in the Father or in others, the

Import of such Obligation is not to constitute *each* particular Child Creditor to the Father in any *determinate* Sum, and to a precise Extent, or intitle them to demand from him an *equal* Proportion with one another, rateable *per capita*; but the Debt or Obligation, consisting of the *universitas*, is held to be granted *familie*, and the Father can distribute or assign to each particular Child any Share that is reasonable according to Circumstances.

The Application is obvious: Mrs. *Marjory* had not in her a Right to a *Half*, more than to a *sixth* or a *twelfth*, or any other Proportion of the Provisions contracted for the Children of *Southdun's* second Marriage; and, as she could not discharge or assign *what was not in her*, she neither could, nor can be supposed to have intended to, discharge a *Half*; and *Southdun* cannot be presumed to have meant to take, or understood himself to get a Discharge to *that* Extent or Proportion *precisely*; but her Discharge, if it can be accounted one, cannot be held either to have been designed, or actually to extend to more than the *particular Proportion* truly allotted to her at the Time, or to the 10,000 Merks, which is expressly declared in the Marriage-contract itself to be *her Share*.

The Argument will appear in a still stronger Light, on attending to the Nature of the Provision here made. It was to 10,000 Merks and to the *Conquest*, expressly declared, *only* to be estimable and ascertainable *at the Dissolution of the Marriage*: *Marjory*, therefore, had not properly a *Right* in her in 1748, at the Time the Portion was given, or supposed Discharge was granted by her; *Southdun's* second Marriage was then subsisting; she might have died *before its Dissolution*, and no *Conquest* might have been made. Thus she had no more than a *spes successionis*, which might eventually have proved worth nothing; and it cannot be supposed, in these Circumstances, either that she understood in her own Mind herself to be giving, or that it was the Intendment of others concerned on the Occasion, that they were receiving from her a Discharge or precisely a *Half*.

And, if *Marjory* neither did, nor could discharge more than her own Share of 10,000 Merks, then actually assigned to, and given with her, it seems, with Submission, clear, that her Discharge or Renunciation (for it is indifferent which it be called) could not import or operate a Discharge of the one *Half*, and that the Memorialist's Share cannot be restricted to the other *Half* of the *Conquest*.

or to more
than the
10,000 Merks
actually al-
lotted to her.

There can
be no doubt
that the Mem-
orialist's Share
is not to be
restricted to a
Half.

quest, stipulated for her by her Mother's Marriage-contract, but that she is entitled, at least, to the full Residue that remains, after the 10,000 Merks already given with Mrs. *Marjory*, are deducted.

And here the Memorialist may fairly resort to the Petitioner's own Argument, already noticed, of which he cannot dispute the Justice, that a Father, who binds himself, in his Marriage-contract, to give his Children certain Provisions, is obliged to make these Provisions good to them: He becomes *Debitor* in them, and it is implied in the Nature of every Debt, that the Debitor must *pay*. Conquest, it is true, is *nomen universitatis*, and Children, provided to the Acquisitions made during a Marriage, are not understood to have a Claim to *every Subject* acquired during its Subsistence, or to have their Father absolutely bound down to make each Particular so acquired effectual to them; but he, the *pater familias* and the Fiar, as he is not compellable to *acquire*, so he is held to retain the Power of Disposal of the *Particulars* of which the *universitas* consists, and he may *change* them, during the Marriage, in any Manner he pleases. But the *universitas* itself must still be made good, and the Moment he dies, or the Time comes at which it falls to be ascertained, their Right, which before was *general*, becomes *special*, and they are entitled to take *every particular Subject*, of which the *universitas*, or Conquest, *then* consists,

This is implied in the Obligation imposed on him by his own Covenant. Every Obligation binds the Debtor to give or do *some particular Thing*, and *that Thing, specified in it*, he is absolutely obliged to perform. But, of all Obligations, those on which Marriage proceeds, or which are solemnly established by Covenant, concluded between the Parties at entering into that important Society, are the most sacred, and the Children, as well as the Wife, are held in Law to be entitled to *full and specific* Implement of them. Those, therefore, for whom the Conquest of a Marriage is stipulated, are entitled to have it *all* made good to them; and though the Father is sometimes impowered to *distribute* it, yet he cannot *with-hold the least Part* from them.

That follows from the very Power of *Division* here vested in him. It is not said that he may *with-hold*, but *divide*; and as Division imports no more than the making a Partition and Allotment of *Parts*, so the Children are entitled to demand that the Conquest be
wholly

wholly divided among them into *Parts*, of which *one* must be allotted to *each* Child, till *all* are exhausted.

Indeed, in the present Case, the Matter is not left to Conjecture, but is clearly expressed in the Marriage-contract 1722, which your Lordships will perceive establishes two Propositions, *1mo*, That the Children are absolutely entitled to the *whole* Conquest. *2do*, That it is specially directed to be *wholly* divided among them.

The Consequence is not remote. *Marjory* and *Katharine* are intitled to have the *whole* Conquest *divided between* them. *Marjory* has already got her *Part*, and is supposed now to be totally excluded: Therefore the *other* Part which remains, and is required to fulfil the Obligation, or render the Division *complete*, must necessarily belong to the Memorialist, and as the Share allotted to *Marjory*, and discharged by her, has already been shown to have actually been not a Half but 10,000 Merks, the Residue, that remains of the *whole* Provisions or Subjects, solemnly covenanted to be honestly *divided between* them, after this Sum is deducted, is that pertaining to the Memorialist.

But extends at least to all that remains over the Portion actually allotted to *Marjory*.

The Petitioner, therefore, or *Southdun's* Heirs-general, instead of being intitled to hold any Part of these Subjects, or to restrict the Memorialist, are themselves bound, as representing *Southdun*, to make them *all* good to her, and they cannot withhold or refuse Implement of the least Fraction, which *Southdun* obliged himself to pay or perform to them.

Petitioner's Argument.

The Petitioner considers the Matter in another Light, and the Sum of his Argument amounts to this, " That *Southdun* was Debitor to his Children in the Conquest and others provided to them.—That Mrs. *Marjory's* Share extended to a Half of those Provisions.—That her Acceptance of 10,000 Merks at her own Marriage, *as her Share of the Conquest*, was equivalent to a Discharge of that Half.—That, as a Discharge of a Debt, granted by a Creditor operates a Liberation in favour of the Debitor, *Southdun* was thereby discharged of that Half:—That such Discharge or Renunciation is equivalent to, or implies an *Assignment*,—and therefore, that *Southdun's* Heirs-general in her Right are intitled to hold that Half, and that the Memorialist's Share must be restricted to the other Half."

But it will not be difficult, on dissecting the Argument, to show it is fallacious almost in every Particular.

The

The first Proposition the Memorialist has no occasion to dispute, on the contrary, it is the Fundamental on which her own Claim is founded, that *Southdun* was Debitor to his Children, or the Issue of the second Marriage in the Provisions of Conquest, and of 10,000 Merks made for them; and it has already been shown, that *between* them they were legally and strictly intitled to every Farthing *covenanted* for them. Answer.

But the second Proposition is clearly erroneous; and it has already been shewn, that Mrs. *Marjory's* Share did not extend to a Half: She was indeed intitled to a *Share*, but that *Share* was *indeterminate*, and depended on the Pleasure of those who should distribute the Subjects between them. Consequently *Southdun* was not Debitor to her in a *Half*; for, if she had been Creditor to *that* Extent, she could have made it effectual at Law, yet it will not be pretended, that, if she had brought her Action, she could have obtained a Decree against her Father *for the Half*, either in 1748, or at any other Time: His Answer would have been good, that her Claim was *indefinite*, and that she could no more demand a Half than a Sixth, or any other Proportion.

The next Proposition, therefore, is equally erroneous, that her Acceptance of the Portion of 10,000 Merks, given with her in 1748, as her Share of the Conquest, was equal to a Discharge of the Half. It might perhaps be equivalent to an Acquittance of *her Share*, viz. that which was or should become competent to her, and we shall suppose in the Argument it was, but it could never go beyond *that*.

Therefore, however the Proposition immediately following, may safely be admitted, that a Discharge of a Debt operates in favour of the Debitor, yet the Discharge or Renunciation here supposed to have been granted, can never extend to a *Half*, because a Discharge can never operate a Liberation for more than *the Debt discharged*, which here was not a Half. Mrs. *Marjory's* Renunciation could go no further than *her Share*; and, as *this* was expressly declared in the Marriage-contract or Deed itself, containing the supposed Discharge, to be 10,000 Merks, the Renunciation then made could not discharge *Southdun* of more than *that precise Sum*, then allotted to her for her Share; and, of course, if an Assignment should be understood to be implied on the Occasion, it could not transfer to a *greater Extent*, particularly to the Prejudice of the other.

ther Obligation under which he lay to the Memorialist, and the Share or Right competent to her.

Put the Case of two *rei stipulandi* of 50,000 Merks, of whom each is intitled *agere in solidum*, but that one of them receives Payment of, and grants a Discharge for, 10,000 Merks, declared either in his own Name, or in that of the Debitor, to be *his Share* of the Money: Is it possible to maintain, that the Debitor could found, on *that* Discharge, a Refusal of paying the full *Balance* of 40,000 Merks to the other, on being sued for it? The Terms of his own Discharge, ascertaining precisely the Sum paid by him, would there meet him. Yet the Case of a Father, who is bound by every Tie to act *optima fide* in all Matters towards his own Issue, is much stronger.

Petitioner's
Argument
inconsistent
with itself.

Indeed, the Petitioner, aware that his Argument, on being attentively canvassed, would directly be discovered not to conclude, was greatly embarrassed to keep *at one* with himself, and he argued in a Manner which was not perfectly consistent: One while he was for having *Southdun* considered as a *Debitor* making Payment, and taking a Discharge of a *Debt* he owed to Mrs. *Marjory* in a Half; at another Time, he did not incline to consider him in *that* Character, but would have your Lordships view him in *one very different*, in the Light of a *Purchaser* making a *Bargain, tanquam quilibet*, with his Daughter for her Share of the Conquest; and therefore he insisted, that *Southdun* did thereby *acquire* Right to the one Half, which was still affirmed or taken for granted to be her Share.

Renunciation
or Transfe-
rion with
Marjory, said
by the Peti-
tioner to im-
ply an assign-
ment or
Transfer
of her Share
to Southdun.

In this View it was stated, that *Southdun* did not mean, in 1748, to make a Division between his Daughters, and that, if he had truly intended to do so, he could not do it for want of Power, as the Power of Division was expressly lodged in him, to be exercised with *Consent of his Wife*, and, failing such Distribution, in *the next of Kin*: Therefore it was said, that he meant only to give a Sum or Consideration, by Way of Price or *Purchase-money*, for a Right to *her Share*, which was thence inferred to accrete and belong to him and his Heirs whatsoever.

Answer.

The Memorialist is little anxious in which of these Lights your Lordships shall consider the Matter, whether you shall think that *Southdun* had the Power of Division, and intended to exercise it, or shall be of the contrary Opinion, because she is humbly hope-
ful,

ful, that the Petitioner cannot be benefited on the one more than the other Supposition.

At the same time, she does humbly incline to think, that a Division was both made, and intended to be made, on the Occasion, and that the Power vested in *Southdun* was properly exercised by him. It is true, the Marriage-contract 1722 says, that the Division shall be made by the Father, *with Consent of the Mother*, but it does not thence follow, that a formal Deed, signed by *both* Parents, the Mother as well as the Father, narrating their Intention of exercising the Power vested in them, and proceeding to make a Division, was necessary to validate it. The Memorialist has not been able to discover any Precedent settling the Manner and Form in which such Power must be exercised, or the Wife must signify her Consent. Thus much, however, seems certain, that Law has not said, *Writ* is necessary, and nothing hindered her and her Husband from settling the Matter *privately* between themselves. Mrs. *Marjory's* Marriage proceeded with the Consent of *all* Parties, and her *Mother* was not only alive in 1748, the Date of the Contract, but *present* at the *Celebration* of the Nuptials. It is true, she does not sign the Contract, but the Memorialist does humbly deny her Signature was necessary, in these Circumstances, to support the Division : The Act of Division was expressly appointed to be made by *Southdun alone*, and she was only required to *consent*. Now, Consent is not like an Obligation or a Disposition, but is a thing which may be signified any-how, *rebus ipsis & factis*, even *nutu*, & *qui tacet* merely, is often held thereby to give it : A Wife acts by her Husband, he is her Curator, he gives Consent for her, and his Consent often implies hers. This must especially hold in Cases like the present, in which a Marriage was deliberately entered into, with the Approbation of Friends on both Sides : There the Consent of all Parties being given to the Marriage itself, which is the principal Point, is justly understood also to extend to the subordinate Matters that pass on the Occasion, particularly to that which is of all the most capital, to wit, the Contract concluded between the Bride and Bridegroom ; and your Lordships have found, that Marriage-covenants, *null* in themselves, are effectually homologated by Marriage actually following upon them, at least, *quoad* all Parties who consent to it. Mrs. *Sinclair* of *Southdun* approved of, and gave her Consent to the Marriage, and was actually a *Party* present at its Solemnization when the Contract was signed :

So

So her Consent may fairly be presumed to have been thereby given to the *Distribution* then made; and as it will not be pretended she did not know of the Partition or Share given with Mrs. *Marjory*, her Subscription was not necessary, but the Consent, solemnly signified by her, in the Manner and on the Occasion aforesaid, was all which could be intended or required by the Clause insert in the Contract 1722, and that was an ample *Homologation* of the *Exercise* which *Southdun* had made of his Power, as well as a strong Declaration, *rebus ipsis et factis*, of her Consent to the Division then made.

But if it should be supposed, that the Mother's Consent was required to be signified in some *other* Manner, still the Petitioner would not be benefited by the Supposition, because it was, at least, a Division made by *Southdun*; his Sense of the Matter is sufficiently apparent, he held and took it for a Distribution, and as it would have been good against *himself*, so his Heirs are bound by his Act, and they cannot be allowed to impeach it.

The Consequence is, that if a Division was actually made, and a Share assigned to Mrs. *Marjory*, consisting of 10,000 Merks, the *other* Share, consisting of the Remainder, must necessarily belong to the Memorialist.

Indeed, the Petitioner's *Supposition* is extremely *violent*, and it cannot be presumed that *Southdun* meant to purchase from his Daughter, or acquire a Right to her Share. It was well observed, that *actus agentium non operantur ultra intentionem eorum*, and the Intention had on the present Occasion is extremely obvious from the Words of the Marriage contract 1748: It is not there said, that *Southdun* intended to make any Purchase or Acquisition from her, but his only Intention was, to *tocher* his Daughter, and *allott* her her Share of the *Conquest*. That Intention is not left to be gathered from Presumptions or Conjecture, but is *expressly* mentioned in the Deed itself; and as *one Share* necessarily implies at least *another* Share and *Division*, *Southdun's* Intention could only be to *distribute* or *divide*, not to *purchase* or *acquire*: Nor will your Lordships stretch the Words beyond their own plain and obvious Meaning, as well as the Sense and Understanding which the Parties appear and *profess* to have had at the Time.

If *Southdun* had intended to make a *Bargain* with his Daughter, some Hint would have been given of it in the Narrative of the Deed; the Treaty proposed between them would have been mentioned; it would

would have been noticed that they were *different Parties*, and some proper Words would have been used, that might have been effectual for transferring her Right to him, such as, that, "In consideration of the 10,000 Merks given with her, she did truly sell, assign, transfer, and dispoſe, from herself and her Heirs, to and in favour of her Father and his Heirs, all Right and Interest she had, or might have, to any Part or Share of the Conquest," but no such Thing occurs.

Indeed, an Acquisition or Bargain, such as that here supposed, is extremely uncommon, and cannot be presumed in any Case: For, into what would such Purchase resolve? Into the Acquisition of a Power made by a Father to do *Injustice* to his own Children, or to disappoint them of *full* Implement of the Provisions solemnly covenanted for them by their Mother and Friends at her Marriage. That is a Power which a Father can in no Case be presumed either to mean or to wish to acquire; and the known Character of *South-dun*, with every Circumstance appearing in the Transaction, authorises rejecting the Supposition in the present.

His Intention is not only expressed *in terminis* in the Marriage-contract 1748, but it is also confirmed by the Tenor of the subsequent Deed, to wit, the Bond above mentioned, which he executed in 1757, that he intended not to purchase or acquire, but only to divide and allot a Share to Mrs. *Marjory*: From that Bond it appears, the 10,000 Merks was given in 1748, not as the *whole* which he intended for her in *all* Events, but only as the Share which he designed for her in *one particular* Case, viz. in the Event of his having *Heirs-male*. In 1748 his second Marriage was subsisting, and he had the Hopes of Male-issue, as well as of augmenting the Conquest. Therefore, the Share he *then* allotted her was small, but after that Marriage was dissolved, and he found he had no Sons, and the Extent of the Conquest was greatly increased by *new* Acquisitions, he made the Deed 1757, by which he augmented her Portion. The Consequence is, that, instead of meaning to exclude Mrs. *Marjory* altogether, or to make a Purchase from her in 1748 of her Right and Interest in the Provision of Conquest, he must only have meant to give a *Share of it*, such as he thought suitable to his Hopes and Prospects, as well as *Circumstances at the Time*; and your Lordships will accordingly observe, that besides increasing her Share in 1757, he expressly reserves her her Right of Succession to *all* and *each* of his Estates, without *any* Exception.

Exception, either of those conquest during his *second* Marriage, or of any others, in consequence of *any* Settlement *made* or to be made in her favour, which is absolutely incompatible with the Idea of his then intending, in 1748, to *acquire* from her.

The Memorialist does therefore humbly hold it, that *Southdun* meant to make, not a Purchase, but a Distribution; and that a Division was actually made in 1748, of which the Consequence is admitted by the Petitioners to be decisive in her favour.

The Memorialist's Claim would not fall to be restricted, even on the Supposition that *Southdun* meant to acquire, and *Marjory* intended to convey to him a Right to her Share.

But if the contrary should be supposed, and it should be thought that *Southdun* had no Power to make a Division, or that he did not properly exercise that Power, but that *he* truly intended to *acquire*, and *Mrs. Marjory* meant to *transfer* to him her Right in the Conquest, the Memorialist does still beg leave to deny the Consequence, that her Share would fall on that account to suffer any Restriction; because the Power of Division, which is vested in two of the next of Kin on both Sides, may still be exercised by them, and the utmost which *Southdun* could possibly acquire, or *Mrs. Marjory* could convey to him by the Renunciation or Assignment, would be *the Share* which *should actually be allotted* her by them, and he could not exclude the Memorialist from that Part which should be thought proper to be bestowed on her. If the Friends should assign to *Mrs. Marjory* no more than 2000 Merks, it is not believed the Petitioner would then hold his present Language, but he would insist that *Southdun's* Heirs whatsoever were intitled, in settling Accounts, to Credit for the 10,000 Merks actually paid, and he would not then insist that he made a Purchase, or acquired a Right to *no more* than *Mrs. Marjory's Share*.

Indeed the Memorialist does humbly maintain, that, in every Supposition which can be made, even if it should be supposed that a Division neither had been, nor could ever be made, her Share could not be restricted to a Half, and the Benefit of *Mrs. Marjory's* Renunciation would accrue, not to *Southdun*, but to the Memorialist. By *Southdun's* Marriage-contract 1722, the *whole* Conquest was specially provided to be divided *among the Children*; and therefore as they were intitled to every Particle of which it consisted, any thing which was withheld from one of them, behoved necessarily to go to the rest, who would of consequence reap all the Benefit of the Inequality or Renunciation of that Individual.

With respect to the Legitim, the Petitioner did not dispute that such would be the Case, and it was admitted, that a Discharge in

Satisfaction

Satisfaction, granted by one or more Children, did not operate a *Transfer of their Bairn Part* in favour of their Father and his Heir or Executor, but the Benefit of it accresced to the other Children remaining unforisfamiliated at his Death, and its only Effect was to make the Renouncers be held not to be in Existence. But he endeavoured to make a Distinction between the Legitim and a Provision such as this, and insisted that an Argument could not be brought from the one to the other. It was said the Legitim was not a *Debt* upon the Father, but a *Right of Division*, which took place only at a *particular Time*, to wit, the Death of the Father; and therefore that no Child, who did not then exist *intra familiam*, was intitled to claim a Share; whereas a Provision of Conquest gave each Child a *jus crediti*, of which he could not be deprived. It is not however thought there is any solid Difference between the two Cases that can influence the present Question.

It is true, a Father can diminish the Legitim by *Alienations*, but that is *equally* true of a Provision of Conquest; he is the Fiar of his own Property, and has the free Administration of it; he is not obliged to acquire; the Subjects acquired by him he can alien, and the Conquest is chargeable for his Debts. In both Cases too, his Power is *limited* to a *certain* Extent; it is not by Testament *only*, or by Deeds done on Death-bed, that a Father is restrained from disappointing the Legitim; *any* Act, *purposely* made in that View alone, is not sustained against it; and it does not seem that his Power is more restricted over the Conquest, because it is only fraudulent Deeds, purposely done for disappointing the Provision, that he is disabled from making. And the Memorialist cannot entirely agree, that the Legitim does not constitute a *Debt* upon the Father. In one Sense this is true; but it is *equally* true of the *Conquest*, and both are considered in that Light by the Lawyers: A Child is understood to have a *Right* to its *Legitim* as much as to its Share of Conquest, of which it cannot be deprived without some Act *of its own*; and it is not the *jus*, but the *Subjects* over which it extends, to which the Father's Power reaches. If the Legitim is a Share of the *free* Gear only, that is *also* true of the Conquest, which is always understood, *deductis debitis*, and in the present Case is expressly declared so to be. The one too, as much as the other, is a Right of Division; for in *both* Cases it is *concurrent* only *quod faciunt partes*; and it will not be pretended that a Child, who dies *before* the Time at which the Right to the Conquest

quest becomes complete, has any Claim to a Share of it, more than a Child has to a *Legitim* on *predeceasing* its Father. In the *Legitim* the Children succeed all *equally*, so do they in the Conquest, unless a Division is actually made; and as the *Legitim* is taken up in the Way of Succession by Confirmation, so Conquest, if its Subjects are *moveable*, is taken up in the same Way, or if they are heritable, they are taken up by Service, and the Persons so served represent the Defunct *suo ordine, qua Heirs of Provision*.

There appears therefore to be a perfect Similarity between the *Legitim* and a Provision of Conquest; and it does not occur why a stronger or different Effect should be given to a Renunciation of the *conventional* than of the *legal* Provision. Where Parties do not settle their own Interests and those of their Children, by a *Covenant* purposely concluded before Marriage, there the Law, supplying the Omission, makes a Contract for them, and they are justly presumed to *stipulate*, as well as to rest themselves contented with, the *Articles or Provisions* which it makes for them; and if a Renunciation made by a Child in the one Case operates in favour of the rest of the Children, why ought it not also to do so in the other? In the one Case it is only *presumed* to be stipulated, in the other it is *actually covenanted*, that the *whole* free Gear or Conquest shall absolutely be divided *among* them: Can the Right of the Children be seriously maintained to be *weaker* on the *last* Supposition than on the *first*?

If Mrs. *Marjory* had died without Issue before her Mother, it is perfectly clear that her Renunciation could not have operated in favour of *Southam*, but the Memorialist, or any other Children that existed, would alone have been intitled to the *whole* Conquest: *Southam* could have carried nothing in consequence of Mrs. *Marjory's* Discharge, or even Conveyance, because she had no Right which she could transfer; and this is precisely what happens in the Case of the *Legitim*. Her Discharge, therefore, or Renunciation, did not *originally* operate in favour of *Southam*, but in favour of the Memorialist; and if so, it is not easy to see in what Way it could come *afterwards* to alter its Operation, or to import a *Transfer* in his favour, of a thing which she had not in her, and could not convey *at the Time*.

Suppose the Conquest had happened wholly to consist of Moveables, and that, by *Covenant*, the Children had expressly been provided *among them* to a *Third* of the *free Gear*, if there should be a
Relict,

Relict, and to a *Half*, if there should be none, divisible in Manner mentioned in this Contract 1722 ; the Memorialist would ask, Whether *Southdun* in that Case would have had Right to Mrs. *Marjory's* Share, or if the *Third* or *Half* of the free Gear, (whichever should have happened to be due,) would have gone *all* to the other Children ? certainly it would have accresced to them ; yet this is the very Case in hand, expressed only in different Words, and applied to a Provision precisely equal to the Legitim ; for what is it that the Memorialist and her Sister were provided to, but the *free Gear* ? And it can hardly be thought, that, in Cases exactly the same, such different Consequences could be produced, merely because, in the one Case, the Articles or Provisions were reduced into Writing, and in the other, the Parties knew there was no occasion for using that Solemnity.

Indeed, even in Cases where the Father can strictly be said to be Debitor, the Renunciation of the *Creditor* does not operate in *his* favour, but in favour of the Children. Suppose a Wife, provided by her Marriage-contract to a Provision out of the *heritable* Estate of her Husband, renounces her Right to a Share of his Moveables, and perhaps to all she can claim anyways through his Death : Her Renunciation, which is certainly a Bargain, implies a Transfer to her Husband of her Third, *at least as much as* Mrs. *Marjory's* Renunciation could in the present Case ; and, as the Provision supposed to be given her is not out of his *Moveables* but out of his *Heritage*, it ought, if any, to vest him in *her* Right to *her full* Share of the Moveables ; yet the contrary is settled, and so it was solemnly adjudged in 1726, in the noted Case of *Nisbet* of *Dirleton*, affirmed in the last Resort, as well as in many others.

The Case of *Allardice* and *Smart*, quoted for the Petitioner, also said to have been affirmed in the last Resort in 1721, can have no Influence on the present : For, *imo*, In that Case the Conquest made consisted entirely of *Moveables*, and the Father had *no Power of Division*, but it was a Point *fixed* by your Lordships, and the Interlocutor was affirmed on the Appeal, " That the " three Children of the first Marriage had an *equal* Interest in the " Provisions contained in their Mother's Contract of Marriage : " A Proposition decisive against the Son of the first Marriage, insinuating for *more* than a *Third* of the Conquest made during its Subsistence, as that was *all* to which he was found *in any Case or Event* intitled,

and his Right was sustained to that Extent ; nor could it enlarge his Claim, *adjudged to be thus limited*, that his two Sisters did both incline to discharge their Father for *less* than the *Third*, to which they were respectively found intitled.—*2do*, In that Case there was a solemn Transaction deliberately made with both Daughters at their Marriages, and in the most *formal* and *extensive* Manner they discharged their Father of all they could anyways ask or crave through his or their Mother's Death, or Marriage-contract. *3tio*, These Transactions were made *long after* the Dissolution of the first Marriage, at which Time it was provided, that the Extent of the Conquest should be ascertained, and the Right of *each* of the Children became *definite* ; therefore the Discharge then granted was precisely like that of the *Legitim*, given by one Child in the Case of *Claud Henderson's* Children, (mentioned by the Petitioner,) *after* the Father was *dead*, the Extent of the Legitim was become *determinate*, and the *Right of that Child*, rendered *fixed* and independent, could not either affect or be affected by those of the other Children. *4to*. The Son of the first Marriage had himself got a very large Provision, greatly exceeding that to which he was intitled by his Mother's Contract ; and it is believed he had also given a Discharge, or at least his Acceptance was declared to imply one : At any rate, his Sisters were *alive* at the Time he entered his Claim, which was after his Father's Death, and *they* did not make any further Demands ; but the Question was solely between the eldest Son of the first Marriage, already amply provided, and and the Widow and *nine* infant Children of the second, left with indifferent Provisions made for them by their Mother's Contract, who brought a considerable Tocher, which yet the eldest Son of the first Marriage wanted to cut down ; but as it was adjudged that a Father was not restrained, notwithstanding a first Marriage-contract, from making rational Provisions for a second Wife and her Children, and that the Provisions there made were no more than rational, so they were most justly sustained, in competition with the Son of the first Marriage.

This Case therefore does not touch the present. Indeed, it was strongly urged in the others already mentioned, of *Nisbet of Dirleton* and *Claud Henderson's* Children, which were long *posterior* to it ; yet your Lordships did not think it ruled either of those Cases ; and that in the Case of *Dirleton*, being carried to Appeal, was affirmed

in the last Resort, which shews no Argument can be drawn from it to the present Case.

But if Mrs. *Marjory's* supposed Discharge and Renunciation should be held to import a Purchase, and operate a Transfer in favour of *Southdun*, still on the Principles already mentioned, it could not extend to a *Half*, or go farther than the Sum actually advanced by him. By the Marriage-contract the Children were provided in the most ample Terms to every thing, heritable or moveable, which *Southdun* should anyways conquest or acquire during that Marriage, and as in fact it is agreed, that he did make Conquest to a considerable Extent, particularly the heritable Subjects before mentioned ; *these Subjects* it cannot be disputed, the Memorialist and her Sister are undoubtedly intitled to take by *Service, qua* Heirs of Provision under that Marriage. The only Question therefore, which can be, is not concerning the *Subjects* or *Share* which they are intitled to take, but concerning that which *Southdun* or his Heirs whatsoever are or may be intitled to *draw back* from them, or rather from Mrs. *Marjory*, after they are vested ; and this your Lordships will immediately see is *nothing*. For

The very Purchase or Acquisition made by *Southdun* from Mrs. *Marjory*, being made during the *second* Marriage, must necessarily accresce, with all the Benefit connected with it, to the Children of that Marriage, in consequence of the express Words and Stipulations contained in that Contract. If *Southdun* had purchased from a third Party a Right to the Share such third Party had to the Provisions made by the Contract past between his Father and Mother, the Benefit of such Acquisition would, as Conquest, undoubtedly have fallen to the Issue of his, *Southdun's*, second Marriage : If so, the Reason does not occur why the Acquisition he is here supposed to have made from his Daughter, during the *Subsistence of his second Marriage*, should not in like Manner, as falling under the Conquest thereof, accresce, as much as any other Purchase, to the Children of that Marriage, in which View *Southdun's Heirs whatsoever* would not be intitled to Repetition or Allowance even of the Tocher, or 10,000 Merks given with Mrs. *Marjory*, no more than for the Price or Consideration given by him for the Lands of *Dun*, or any other Subjects, which he purchased during his second Marriage. Indeed, the Purchase here made was actually made with the Money belonging to the Children of that Marriage, because
every

every Penny he acquired, (except the landed Estate he had at entering into it,) was provided to them, and therefore in Law, as well as Equity, and the Spirit of the Contract, the Benefit of it ought to go to them alone, as if they had not had the Subjects purchased, they would have had the Money.

But if the Benefit of that Acquisition *could* go to him or his Heirs whatsoever, contrary to the Spirit as well as Letter of the Covenant, still he could take no more by it than the 10,000 Merks, which he himself allotted and declared to be her Share. Sale is an onerous as well as mutual Contract, in which *Equality* is always intended to be preserved among the Parties, and each gives no more than is understood to be *equal* to that which he gets. The Consideration here supposed to be given by *Southdon* is precisely ascertained to be 10,000 Merks, and the Thing alledged to be acquired by him is also established to be *her Share, declared, in the Deed itself*, and at the Time, to extend to no more than *that Sum*. Therefore, supposing such a Purchase could be sustained in Law or Justice, the utmost Length it could go would be to give *Southdon* a Right, or *jus crediti* over the *whole* Conquest-subjects, or other Provisions in the Marriage-contract, to the Extent of that Sum, or Mrs. *Marjory's* Share, already ascertained to it by himself, by which the Memorialist's Interest could not be affected, as she would still be intitled to draw the Residue which remained after *Southdon's* Heirs-general, in the Right of Mrs. *Marjory*, had drawn or got Credit for the said 10,000 Merks.

And this leads the Memorialist to submit, whether the Purchase or Transaction could at all be supported in Law or Justice to a greater Extent. The *fides tabularum nuptialium* is justly held to be most sacred, and every thing contrary to that Faith is reprobated by Law. Children, *in famula*, are entirely subject to the Influence of their Parents, and every gratuitous or unequal Deed, which a Father takes from a Child, liable to that Influence, implying a Species and Degree of *vici*, is, on solid Grounds, suspected of being improperly procured, if not rejected entirely by Equity and Justice.

On this Principle, an Heir, from whom his Predecessor takes an Obligation, by which he renounces his Right of challenging Deeds done to his Prejudice *in loco*, is not understood to be thereby barred from quarrelling them. Indeed, the Consequences would be most fatal, if Transactions, such as the present, should be allowed,
contrary

contrary to the plain Intention of Parties, to operate in favour of *the Father*, or held to import an Acquisition of Interest to a greater Value or Extent, than the Shares or Considerations truly given by him. In all Cases, where the Father has a Power of Division, each Child is entirely dependent on his Pleasure or Caprice, for the particular Share or Portion which shall be given him, and it is easy to suppose, that, by Threats of exercising his Power, or by other Means, he may, for the merest Trifle, procure, especially from a weak or necessitous Child, a Renunciation, or even a formal Assignment, to all which that Individual could ask or claim through the Marriage-covenant of his Parents. The Consequence is plain, that, on the Petitioner's Principles he would be enabled, being thus armed, totally to *disappoint* all the other Children of the Provisions onerously contracted for them by their Relations, as he is already possessed of a Right to the Share of one Child, and could either proceed in like Manner with all the rest, or by actually exercising his Power of Division, and assigning to that Child, into whose Place he is supposed to be come, a very large Portion (which he is also supposed intitled to retain or claim for himself) he might leave an absolute Trifle, and Beggary to the other Children. Thus the Children might be defrauded of the Provisions stipulated for them.

And the same thing would happen, even if the Child with whom he transacts should *freely* and *cheerfully* accept of a Portion, and grant a Discharge, because Law and Justice would not allow a Father and a Child, by any private or collusive Transaction between themselves, to hurt the Interest of the other Children having a *just crediti* to their full Provisions.

A Trustee, an Executor, or a Cautioner, is bound to communicate the Benefit of Eases which he gets to those having Interest; and shall a Father, who has come under *solemn* Obligations to his own Children, be allowed an Advantage not tolerated among indifferent Persons? He is a sort of Trustee and Guardian of his Children, and in taking a Discharge from any of them, is not, like a common Debtor, supposed to have his own Interest alone in view, but to intend the Good of his Family and the remaining Children.

Upon the whole, therefore, the Memorialist is hopeful your Lordships will refuse the Petition, and adhere to the Interlocutor of the Lord Ordinary.

In respect whereof, &c.

GEO. WALLACE.



[*Papers referred to in the memorial for David Threipland-Sinclair,
&c. against Mrs. Katharine Sinclair.*]

JOHN ALLARDICE, Merchant, Appellant.

JANE SMART, Widow and Executrix of *John Allardice* deceased, on behalf of herself and Children, Respondent.

THE APPELLANT'S CASE.

JOHN ALLARDICE, late Provost of *Aberdeen*, the appellant's father, deceased, by articles of marriage between him and *Agnes Mercer*, the appellant's mother, in consideration of the said marriage, and of 3000 merks portion, obliged himself to add 3000 merks thereto of his own money, and to lay out and settle the 6000 merks on himself and the said *Agnes* for life, and to the heirs of the said marriage in fee: And it was therein further provided, that whatsoever lands, heritages, fishings, debts, sums of money, and other things, either of the said parties should acquire or succeed to during the said marriage, the heirs thereof should succeed thereto *in integrum*.

The appellant's father had issue by the said *Agnes*, who died in *August* 1700, the appellant, his only son of that marriage, and two daughters, who had only 4000 merks a piece given them in full of all they could claim: And it appears by the appellant's said father's books, that at the time of the death of his mother, his free stock was 18,000 *l. Scots*, besides his house in *Aberdeen*, valued by him in his said books, at 5210 *l. 16 s. 9 d. Scots*, and all his household goods.

The appellant's said father afterwards, in *February* 1703, at which time his stock, besides his houses and household goods, amounted to 20,307 *l. 10 s. 10 d. Scots*, entered into a second marriage with the respondent, and by contract, obliged himself to
add.

and 15,000 marks to her portion of 70000 marks, making 22,000 marks, to be settled for himself and wife for life, and to the children of that marriage in fee, with a clause as to future acquisitions in favour of those children, and a different provision of the said house in *Abbeys*, by way of lease, for the respondent, which he was obliged to warrant; but being sensible that the said house would, after his death, belong to the appellant, it was provided, that if the respondent should, after his death, be evicted thereout, she should be allowed 100 *l. Scots* yearly for the rent of any other house she should think fit to take.

The appellant's father died in May 1718, leaving several children of that marriage, at which time his stock was 39,535 *l. 1 s. 6 d.* besides his houses and household goods, which, by this last contract, were provided in favour of the respondent, heirship moveables included: And, by his will, made some short time before his death, and a codicil on death-bed, he named his wife sole executrix and universal legatrix, with the burden of certain legacies and portions to his children of that marriage, amounting to 41,000 marks, which was double the special provision in her contract of marriage.

The appellant, after his father's decease, being intitled to the said sum of 16,000 *l. Scots*, after deduction thereout of the said 2000 marks, paid to his two sisters, and to the said house in *Abbeys*, as acquired by his father during his first marriage, and expressly provided to the heir of that marriage, brought his action before the Lords of Session in *Scotland* against the respondent, for recovery thereof: who having appeared for herself and children, and the process coming in court before the Lord *President* Ordinary, his Lordship, by consent of parties, referred to *Darrel Spence* an accountant to inspect the deceased's books of accounts for clearing the extent of the acquisitions during the respective marriages, which he hath accordingly done, and reported the same to be as is before stated. And the said cause coming afterwards to be debated before the Ordinary, it was objected for the respondent, as to the 18,000 *l. Stock*:

Objection. That by the appellant's said mother's contract of marriage, all her children, as heirs of that marriage, being to succeed to the acquisition, his sisters acceptance of portions as satisfaction, and discharging their father, made their shares thereof return to the father, so as he might dispose of the same as he pleased; and that

that therefore the appellant was intitled to only one third part of that sum. To which it was answered,

That tho', by the conception of the contract, the heirs of the marriage are to succeed, which, when the subject of the succession is personal, may admit of the interpretation, that the provision was in favour of the children, yet still the father had the power of division; and he having given only 4000 merks to each of the daughters, which they accepted, this was nothing else but a dividing to each of them their share thereof, leaving the rest for his only son to succeed to, who, properly speaking, is the only heir of the marriage; and, without this, the said contract could never be fulfilled, whereby the succession to the acquisition was provided to the heirs of the marriage *in integrum*: And this appears to be the father's intention, since he took no assignment of any pretensions his daughters might have thereto, but gave them such a provision as he thought was suitable, with respect to the heir, and the extent of his fortune.

That no clause of acquisition, in a first contract, excludes rational provisions for a second marriage; and the father having actually obliged himself in 15,000 merks, which, with the portion, made 22,000 merks to the children of the second marriage, was a rational provision, according to his circumstances at that time, together with the acquisition during the second marriage, this special provision of 15,000 merks, ought to be deducted from the sum of 20,000 *l.* the deceased's stock, at the time of his second marriage, especially, since there will remain more than the particular provision of 6000 merks in the first contract, besides the house and household goods. Obj. II.

1st, That as to the house in *Aberdeen*, it was out of the question; the appellant's father, during his first marriage, having made resignation, by a disposition granted by his father to him, in favour of himself and wife, in conjunct fee, and to the heirs of that marriage in fee; and the appellant, who alone could be heir of the marriage in lands, is accordingly cognosed heir by help and staple, and infeoffed.—2^{do}, As to his other stock, amounting to 18,000 *l.* at the time of the dissolution of that marriage, and to 20,000 *l.* by the improvement thereof, at the time of entering into the second marriage; the provision of 15,000 merks to the children of the second marriage was more than a rational provision, when the remainder included the special provision of 6000 merks Answer.

merks in the first contract: But, *3th*, There neither was, nor could be, a disposition or assignation to any part of the deceased's stock at the time of entering into the second marriage; all that he could do was, to oblige himself in the sum of 15,000 merks certain to the children of the second marriage, which must always be supposed to be made good out of any other separate estate, which he had, or might acquire, without prejudice to his obligations in his first contract of marriage, the children of that marriage being properly creditors to the father. And, *4th*, The father, at his death, left an estate behind him sufficient to satisfy both his marriage contracts.

That as to the house in *Aberdeen*, the appellant's father was seized thereof in fee, and might dispose of it at pleasure; especially for a rational provision for the respondent, his second wife, for her life, and that he had warranted the same; and that the appellant, as his heir, was bound by such warranty.

That by the second contract of marriage, it appears, that both parties were dissilent of the effect of the respondent's liferent of the house: for though the appellant's father warranted, yet he provided, that, in case of eviction, his heirs should only be liable in *100 l. Scots per annum* to her for the rent of another house; which *100 l. Scots* ought to be taken out of the acquisition during the second marriage, rather than the appellant, the heir of provision of the first marriage, and consequently creditor, should be burdened therewith.

Which matters in debate having been reported by the Lord Ordinary to the whole Lords, their Lordships, on the 16th of *February 1740*, " Found, that the heirs of the first marriage have
" right to the whole acquisition during that marriage, in regard
" that at the time of their mother's death, there was a sufficient
" fund to answer the provisions in both contracts of marriage:
" And found, that the provisions in favours of the heirs of the
" first marriage, are to be understood in favour of the children
" of the marriage: of which there being three in number, and
" two of them having accepted of special sums from their father,
" in satisfaction of all they could claim, by virtue of the said contract, therefore the appellant was only intitled to claim a
" third share of these provisions: And found the provisions in
" the second contract of marriage are rational and suitable provisions: And found, that the relict has right to the liferent of
" the

“ the house provided to her by the contract of marriage with her husband, who was a liar.”

The appellant having, by his petition to their Lordships, reclaimed against the second and fourth articles of the said interlocutor, and an answer being given in thereto, their Lordships declared, they would hear parties procurators on what was therein represented; which they having accordingly heard debated before them, their Lordships, by their interlocutor of the 14th of *July* 1720, found, that two daughters of the first marriage, having accepted of provisions in their contracts of marriage, in satisfaction of all that could fall to them by the mother's contract; which provisions being less than would have fallen to them as two of three children of the first marriage, supposing that all the children of that marriage were intitled to an equal share, the superplus of the two thirds more than the provisions received, did not accresce to the son of the said marriage, but was at the father's free disposal. And before answer to the debate, whether the provisions in the first contract in favour of the heirs of that marriage, did intitle the son of that marriage to the succession thereof, exclusive of his two sisters? Or, if the three children had an equal interest? They ordained the records of returns in the chancery to be inspected, and that either party might have access thereto, that it might appear, whether, in case of provisions of sums of money, or other moveables in favour of the heirs of a marriage, the eldest son of that marriage be not usually and uniformly returned heir of provision of the marriage, exclusive of daughters or younger sons; or if usually, or in any case, more sons and daughters of a marriage are found to be returned heirs of provision by virtue of a contract of marriage, conceived in the terms aforesaid; and that the directors of the chancery should certify what appeared thereon: And found, that the clause of acquisition in the deceased's first contract comprehended goods, merchandise, and gear: And also found, that the special sum provided to the children of the second marriage, is in the first place to be taken out of the acquisition during that marriage, and that the same does affect the acquisition of the first, in case, and in so far only as the acquisition of the second marriage falls short of satisfying the same.

July 14.
1720.

In pursuance hereof, the deputy-director of the chancery, by his certificate under his hand, dated the 18th of *July* 1720, certified, that after inspection of the register of returns, he found, that the

eldest son of a marriage is usually and uniformly returned as heir of provision of the marriage, and that solely, and no other person joined with him; and that in no case it did occur therein, that more sons and daughters of a marriage are returned heirs of provision, by virtue of a contract of marriage conceived in favour of the heirs of a marriage: But in another certificate, dated the 10th of *January* 1720, procured by the respondent, says, it did not occur therein, that any person is served heir of provision to sums of money, or other moveables.

And afterwards, upon producing the said certificates, and hearing the import of the word, *heirs*, debated, their Lordships were pleased, by their interlocutor of the 11th of *January* last, to find, that the three children of the first marriage had an equal interest in the provisions contained in their mother's contract of marriage.

The appellant conceives himself aggrieved by so much of the said interlocutors of the 16th *February* 1712, and of the 14th *July* 1720, as make the word, *heirs*, only to signify children, &c.; and that the appellant hath only a right to a third part of the provisions in his mother's contract of marriage, and as makes the benefit of his sisters discharge accrue to the father, and as burdens the provision of the first contract with the respondent's liferent of a house, by the said interlocutor of the 11th of *January* 1712.

I. For that the import and constant acceptation of the word *heirs*, in all deeds and writings, is always understood of the eldest son; the only case wherein daughters are joint heirs with the eldest son in the personal estate, being, when they are left unprovided by the father; which is no ways applicable to this case.

II. For that the uniform and usual practice of the records of returns in the chancery of *Scotland*, evidently shews, that the appellant was only capable of being returned heir of provision in the contract of marriage, and was accordingly so returned.

III. For that the two daughters are, by this decree, intitled to an equal share to the whole provisions in the contract, both real and personal, which is directly contrary to the constant practice of the *Scottish* law, and the universal custom of all degrees of persons, who always make a difference between the eldest and younger sons and daughters, even when provisions are to children, much more when to heirs.

IV. For that it is evident that this was the intention of the parties to the contract, by their using simply the word, *heirs*, the meaning of which they could not be ignorant of; and by the particular enumeration of the subjects provided to the heirs, *viz.* lands, heritages, fishings, &c.

V. This decree seems to be contradictory in itself; since the Lords of session, by the first part of their interlocutor of the 16th of *February*, find, that the heirs of the first marriage have a right to the acquisition during that marriage, which the respondent hath acquiesced in: And yet it is not alledged, that there is more than 8000 merks paid; and the provision to the appellant and his sisters, by the codicil to their father's will, comes far short of fulfilling the provision in the first contract.

Therefore for these, and other reasons, the appellant humbly hopes that the said interlocutors shall be reversed.

ROBT. RAYMOND.

C. TALBOT.

London, 31st December 1767.

I *John Spottiswoode* of the *Inner-Temple*, solicitor, hereby certify and attest, That I compared, examined, and collated the foregoing case for the appellant (in an appeal wherein *John Allardice* merchant is appellant, and *Jane Smart*, widow and executrix of *John Allardice*, and her children, were respondents), which consists of the ten preceeding pages, and was copied from a printed case said to have been given in to the house of Lords, at determining the said appeal.

JOHN SPOTTISWOODE.

JOHN.

JOHN ALLARDICE Merchant in
Campvere, eldest Son and Heir
 of *John Allardice* Merchant in
Aberdeen, deceased, - - - } Appellant.

JANE, Widow and Executrix
 of said *John Allardice* late Mer-
 chant in *Aberdeen*, deceased, } Respondents.
 and her nine infant Chil-
 dren, }

XX

THE RESPONDENTS CASE.

THAT by articles of marriage between the said *John Allardice*, deceased, and *Agnes Allardice*, his first wife (mother to the appellant), the said *John Allardice* covenanted to lay out 30000 marks Scots of his own money, together with the like sum he was to receive with her, as her portion, upon land, or other good security, and settle the same upon himself and the said *Agnes* in conjunct use and liferent of the longest liver of them two, and the heirs to be lawfully procreated between them; and in default of such issue, to the said husband, his heirs, executors and assigns: with this proviso,

“ That whatsoever lands, heritages, filings, debts, sums of money, and others, it shall happen either of the said parties to conquer, acquire, or succeed to during the time of the said marriage, the heirs of the marriage shall receive thereto *in integra*.”

That the said marriage took effect, and in 1684 *John Allardice*, the appellant's grandfather, by deed conveyed a house in *Aberdeen*, with its appurtenances, to the said *John Allardice* the father,

ther, and the said *Agnes*, his spouse, in conjunct fee and liferent of the longest liver of them two, and the bairns lawfully begotten, or to be begotten betwixt them, remainder to the said *John*, the father's right heir.

That the said *Agnes*, the wife, died in 1700, leaving issue the appellant and two daughters; at which time the appellant's said father's estate was about 17,000 *l. Scots*, besides the said house in *Aberdeen*. 1700.

That by marriage articles between the appellant's said father Jan. 15. and the respondent *Jane*, the appellant's said father covenanted 1702-3. to lay out 15,000 merks *Scots* of his own money, together with the sum of 7000 merks he was to receive as the said *Jane's* portion, upon land or other good security, and settle the same upon himself and the said *Jane* in conjunct fee and liferent, and to the children to be procreate of the said marriage in fee; and in default thereof, to the husbands, heirs, executors and assigns; with this further covenant,

" That he should provide and secure all lands, tenements, heritages, annualrents, debts, sums of money, tacks, rooms, possessions, and other goods and gear whatsoever, heritable or moveable, which should happen to be conquered and acquired by him and his said future spouse, during the standing of the said marriage, to himself, and the children to be procreate thereof; and in the default of the same, to his nearest heirs and assigns."

He likewise covenants by feoffment and livery of seisin, to settle the said house in *Aberdeen* (conveyed to him by his father), upon the respondent during the time she should continue his widow.

That this marriage took effect, and the said *John Allardice* the father maintained and educated the appellant's two sisters for many years; and having bred him a merchant, he fixed him at *Campvere*, and gave him 10,000 merks *Scots*; and his two daughters, by the first venter, were married in his lifetime, and he gave each of them 4000 merks for their portions; and the said two daughters, by their marriage articles, released him of all provisions they could respectively claim by their mother's marriage articles, or otherwise howsoever.

That the appellant's said father died, leaving the respondents May *Jane*, and nine infant children: To the four sons he, by his will, 1718. devised 6000 merks each, and to the five daughters 4000 merks each.

That the appellant, not satisfied with the 10,000 merks given to him by his father, and the said house in *Aberdeen*, subject to the respondent *Jane*'s right thereto during her widowhood, brought his action before the Lords of session in *Scotland*, against the respondents; whereby, as son and heir of the first marriage, he insisted upon several claims; particularly,

That his father's estate being, at the dissolution of the first marriage, 18,000 *l. Scots*, or thereabouts, all the conquest made and acquired during that marriage, by the said articles, between the appellant's said father and mother, being settled upon the heirs of that marriage, the appellant was entitled to the whole thereof, deducting only the sum of 8,000 merks, paid by the appellant's father to his two daughters, the other children of the said first marriage.

That the house in *Aberdeen* being conveyed to the appellant's father, during his said first marriage, the same ought to have descended to the appellant, immediately upon his said father's death, in virtue of the said marriage articles, discharged from any liferent right to the respondent during her widowhood. The appellant likewise claimed the third of the household furniture his father was possessed of at the time of his mother's death; and insisted his said several demands should be paid to him out of his said father's estate, preferable to the provisions made in favour of the respondents.

The respondents appeared to this suit, and insisted, That as it did not appear the appellant's father's estate amounted to so much as 18,000 *l. Scots* at the dissolution of the first marriage; so, though it had, the appellant could claim no more than a third share thereof, it being provided to the heirs of the marriage; and there being three children of that marriage, the same would, by the construction of the articles, be equally divided among them; and the appellant had already received more than his third, it being admitted he had received 10,000 merks: And although the father had agreed with the two daughters, and obtained their release for a smaller sum than their third share, the appellant cannot claim any benefit thereby: He has got his own third, and the other children do not make any demand.

As to the claim of the house, the respondents insisted it was not conquest, since it was a conveyance from a father to a son, to which he would have succeeded as his heir; besides, the father

was

was in the fee thereof, and had the absolute power of it, and might have sold it; much more might give a right to the respondent *Jane*, during the time she continued a widow. But if that were not the case, the same being by the conveyance provided to the bairns of the marriage, the appellant has but a right to one third thereof; and as to the third of the furniture, the appellant might have it when he pleased.

This cause being heard before the Lord Ordinary, his Lordship reported the same to all the Lords, who found, that the heirs of the first marriage have right to all the conquest, during the marriage betwixt *John Allardice* and their mother, in regard that at the time of the mother's death, there was a fund sufficient to answer the provisions in both contracts of marriage; and that the provisions in favours of the heirs of the first marriage, are to be understood in favour of the children of the marriage, of which there being three, and two of them having accepted of special sums from their father, in satisfaction of all they could claim in virtue of the said contract, that therefore the appellant is only intitled to claim a third share of these provisions: And found, that the provisions in the second contract of marriage are rational and suitable provisions; and that the respondent, the widow, has right to the liferent of the house provided to her by the contract of marriage with her husband, who was a liar. Feb. 16.
1719-20:

That the appellant petitioned the said Lords against the said interlocutor, to which the respondents having given in answers, their Lordships declared they would rehear the cause; and the same was accordingly reheard, and their Lordships pronounced the following interlocutor.

That two daughters of the first marriage having accepted of provisions in their contracts of marriage, in satisfaction of all that could fall to them by their mother's contract; which provisions being less than would have fallen to them as two of three children of the first marriage, supposing that all the children of that marriage were intitled to an equal share, the superplus of two thirds more than the provisions received, did not accresce to the son of the said marriage, but was at the father's free disposal. And before answer to the debate, Whether the provisions in the first contract, in favour of the heirs of that marriage, did intitle the appellant, as son of that marriage, to the succession thereof, July 14.
1720.

thereof, exclusive of his two sisters; or if the three children had an equal interest? they ordained the records of returns in the chancery to be inspected in relation thereto, and that the director of the chancery should certify what appeared thereon: And find, that that clause of acquisition in the deceased's first contract, does comprehend merchandise, goods, and gear: And also find, that the special sum provided to the children of the second marriage is, in the first place, to be taken out of the acquisition during that marriage: and that the same doth affect the acquisition of the first, in so far only, as the acquisition of the second marriage doth fall short of satisfying the same.

That the director of the court of chancery having certified, that it did not occur in the registers of returns in chancery, that any person was served heir of provision to moveable sums of money, or other moveables, the said Lords found the three children of the first marriage had an equal interest in the provisions contained in the mother's contract of marriage.

Against these interlocutory sentences of the 16th *February* and 14th of *Jul.* 1725, and 11th of *January* 1721, the appellant has brought his petition and appeal, and prays that the same may be reversed for these reasons.

That the appellant, as heir of the first marriage, is, by virtue of the articles, intitled to whatever estate his father was possessed of, or intitled unto, at the time of the dissolution of that marriage, deducting what was paid to his two sisters.

The appellant has only a right to the third of what his father had when the first marriage dissolved; for the provision is in favour of heirs to be lawfully procreate betwixt them: That can have no other meaning, but the children of the marriage, and not of the heir male only, especially in cases where there is nothing but personal estate; and the rather, since the 6000 merks agreed to be settled, is to go in the same way as the conquest: That plainly shows the import and meaning to have been all the children, otherwise the younger children must have had nothing at all.

That if all the children were to succeed equally, yet the father had the power of division: and he having given 4000 merks to each of his daughters, and which they accepted in full of what they could claim by their mother's marriage contract, that could only be construed to be an appointment to each of them, of a particular

particular share of the conquest, leaving the residue to the appellant, who properly is the only heir of the marriage; for otherwise the clause in the marriage articles could not be pursued, since the conquest would not descend to the children of the marriage; and this seems to have been the father's intention, since he only took releases from his daughters, but no assignment to their proportions.

That the father being the person bound to apply the conquest Answer. to the children of that marriage, he might discharge that obligation the best way he could do, to the satisfaction of the parties; and as he was the debtor, whatever advantage is obtained by any transaction, must be to the use of the father; for he must be presumed rather to discharge himself, than acquire any right to another. The two sisters were then intitled each of them to a third share; the father agrees with them for a less sum: That must and can only be to the benefit of the father, who was their debtor; and the rather, since he had been at the expence of their education and marriages after his second marriage, which so far diminished the conquest during the second marriage, and to which the respondents had a right: Nor could there be any occasion for an assignment to the daughters' shares; for the father being debtor, the release extinguished the debt; and the father was so far from intending any benefit to the appellant by these transactions, that he expressly declares the sum of 10,000 merks, and fee of the house given to him, should be in full of all he could claim by his mother's contract of marriage, or any other way whatever.

That the house in *Aberdeen* being settled upon the appellant's Obj. III. father and mother in conjunct fee and liferent, and then to the heirs of that marriage, the appellant's father was only tenant for life, and consequently could not settle the same upon the respondent *Jane* for her life; and the appellant's father seemed to be so sensible of this, that he provides, that in case she should not peaceably enjoy the said house, there should be a yearly payment made to her of 100 *l. Scots* in lieu thereof, which payment, the appellant insists, ought to be paid to her, and he let into the immediate possession of the said house.

That the appellant mistakes the construction of the conveyance Answer. of that house, for his father was thereby seised in fee thereof; he could have disposed of it to whom he pleased, and, consequently, the settlement thereof upon the respondent for her life only, cannot

not be called in question by the appellant; and the rather, since the father has warranted the said house to the respondent, which warranty descends to the appellant as his heir, and he is thereby bound to perform his father's covenant, and cannot call in question any of his father's deeds; which case was determined by the right honourable the house of peers in 1718, in the cause of *Mum and Aitoun*.

That as the greatest part of the appellant's father's estate was gained during the second marriage; that as the fortune the respondent *Jane* brought, was more than twice as much as that of the appellant's mother; that as the appellant has had his education at the expence of his father, and has received much more than any of the children of the second marriage, who must be educated, and whose provisions are much diminished by this expensive suit; that as the provisions for the respondents, the infants, are entirely rational; the respondents humbly hope, that the interlocutors complained of shall be affirmed, and the appeal dismissed with costs.

SAM. MEAD.

WILL. HAMILTON.

London, 31st December 1767.

I *John Spottiswoode* of the *Inner-Temple*, solicitor, hereby certify and attest, That I compared, examined, and collated the foregoing case for the respondents, (in an appeal wherein *John Allardice*, merchant in *Cambrere*, was appellant, and *Jane*, the widow and executrix of *John Allardice*, some time merchant in *Aberdeen*, and her children, were respondents;) which case consists of the eleven preceding pages, and was copied from a printed case, said to have been given in to the house of Lords at determining the said appeal.

JOHN SPOTTISWOODE.

Die Lunæ, 12^{mo} Februarii 1721.

AFTER hearing council as well on *Monday* last as this day, upon the petition and appeal of *John Allardes* merchant, complaining of several interloquitory sentences, or decrees of the Lords of session in *Scotland*, of the sixteenth of *February*, and 14th of *July* One thousand seven hundred and twenty, and the eleventh of *January* following, made on the behalf of *Jane Smart* and her children; and praying, that the same may be reversed: As also, upon the answer of *Jane*, the widow of *John Allardes* late merchant in *Aberdeen*, on behalf of herself and children, put in to the said appeal, and due consideration had of what was offered on either side in this cause; It is ordered and adjudged by the Lords spiritual and temporal in parliament assembled, that the said petition and appeal be, and is hereby dismissed this house; and that the interloquitory sentences or decrees therein complained of, be, and are hereby affirmed.

Allardes against Smart et al. interloquitor affirm-
med.

ASHLEY COWPER, *Cler. Parliamentor.*

Unto the Right Honourable the Lords of Council and Session,

THE
P E T I T I O N

O F

Mrs. *Katharine Sinclair*, second lawful Daughter of the deceased *David Sinclair* of *Southdun*, by Mrs. *Marjory Dunbar*, his second Wife ; and of *James Sinclair* of *Duran*, her Trustee ;

Humbly sheweth,

THAT the deceased *David Sinclair* of *Southdun* intermarried with Mrs. *Marjory Dunbar*, his second Wife, and by the Marriage-articles, of this Date, became bound and obliged to invest the said *Marjory Dunbar* in Life-rent-lands worth 500 Merks of free yearly Rent, and to settle and secure the Children to be procreate of said Marriage, in the Sum of 10,000 Merks, to be divided amongst them, by him, the said *David Sinclair*, and failing such Distribution, by two of the nearest of Kin on the Father's Side, and two on the Mother's Side, and he became thereby further bound and obliged, to settle and secure whatever Lands he should happen to conquest and acquire during said Marriage, one Half thereof to the said Mrs. *Marjory Dunbar*, in Life-rent, and the whole to the Children of the Marriage in Fee, to be divided among them in Manner above mentioned, declaring that nothing shall be habite and reputed Conquest, but what he

1722.

A

shall

shall be worth at the Dissolution of the Marriage, beyond his present Land-estate, and after Payment of all his just and lawful Debts, already contracted, or to be contracted by him during the Marriage.

That this Marriage dissolved, by the Death of Mrs. *Marjory Dunbar*, in 1755, leaving Issue two Daughters, *Marjory*, and the Petitioner *Katharine*.

That, during the standing of this Marriage, *Southam* acquired a Wadset of the Lands of *Letherbrakeel*, redeemable for Payment of 25,000 Merks :— A Wadset of the Lands of *West Camusby*, redeemable for Payment of 2447 *l. Sterling* :— Some Houses in the Town of *Thurso* :— And, the Lands of *Dun*, computed to be worth 6000 *l.* or 7000 *l. Sterling* : the Rights of all which were taken to *Southam* himself, and his Heirs-general, though subject to the Obligation contained in the second Marriage-contract, for providing and securing these, to the Issue of that second Marriage.

1745- That *Marjory*, the eldest of these two Daughters, intermarried, of this Date, with *John Dunbar*, Son to Sir *Patrick Dunbar* of *Northfield*, and by the Marriage-articles, in which *Southam* was a Party, he became bound and obliged to pay to Sir *Patrick Dunbar*, in Name of Tocher with his said Daughter, and as her Share of the *Conquest*, the Sum of 10,000 Merks.

1751- That, of this Date, *Southam* executed a Bond of Provision in favour of the Petitioner, *Katharine*, the youngest Daughter of his second Marriage, whereby he became bound and obliged to pay to her and her Heirs, Executors, or Assigns, 1000 *l. Sterling*, at the first Term of *Whitsunday*, or *Maritime* after his Decese; and, in the mean time, to aliment her in his Family, and to furnish her with Cloaths, and other Necessaries, or, in his Option, to pay her 100 *l. Sterling*, to provide these for herself, declaring, " That
 " these Provisions are granted by him, and accepted by the said *Katharine Dunbar*, in Consideration, and in full Satisfaction to her,
 " of her Share of the Provisions granted by him in the Contract of
 " Marriage between him and his said deceased Spouse, in favour
 " of the Daughters of that Marriage, *Julia*, *Elizabeth*; and, in
 " Consideration, and full Satisfaction to her, of her Share of the
 " Provisions of *Conquest* of Lands and Heritages, and others whatsoever, which should be acquired during the Marriage, granted
 " by him in favour of the Children of his said Marriage, *Julia*,
 " *Elizabeth*, and in Consideration and full Satisfaction of the said
 " *Katharine*

“ *Katharine Sinclair*, her Portion-natural, Bairns Part of Gear, Share of Moveables, Legitim, or other Pretensions whatsoever, which she, as one of the only two Daughters and Children of said Marriage, can anyways ask, claim, or pretend to, from him, in and through the Decease of her Mother, or of him, when the same, by the Pleasure of God, shall happen; and the said *Katharine Sinclair*, by her Acceptation thereof, declares, that thir Presents are granted and accepted of by her, in Consideration and full Satisfaction of the haill Premisses, and of all other Pretensions, excepting his own Good-will allenarly, and her Succession to his Estate, if the same falls to her by Right of Blood, or any Settlement made or to be made by him.”

That, from this Bond, of the Tenor above recited, it is apparent, that *Southdun* understood the Petitioner's Acceptation thereof, to be essentially requisite to exclude her from those Claims, which were otherwise competent to her, either of Legitim and Bairns Part of Gear, or of the 10,000 Merks and Conquest, which, by her Mother's Contract of Marriage, he stood bound to secure to the Issue of that Marriage, as it was only in the Event of her accepting of that special Provision, that she was thereby excluded from these her other Claims; and as, in fact, she never did accept thereof, it is a clear Case, that these her other Claims, both of Legitim, Conquest, and of the special Provision of 10,000 Merks remained as entire, as if no such Bond of Provision had been granted in her favours, her Acceptance of that special Provision, being the Condition, *sine qua non*, of her being excluded from the others.

That, as *Southdun* could not be insensible, that the 10,000 Merks, which he had given to *Marjory*, the eldest of these two Daughters, in her Contract of Marriage, in name of Tocher, and the 1000*l.* which, by the Bond above recited, he had become bound to pay to your Petitioner, *Katharine*, the other Daughter, were far short of the Provisions secured to the Issue of that Marriage, by their Mother's Marriage-contract, he resolved to make an Addition to the Provision of *Marjory*.

And, accordingly, of this Date, he granted Bond to *Marjory* and Mr. *Sinclair* of *Harpsdale*, her then second Husband, in Conjunction and Liferent, and to the Child, or Children, procreate, or to be procreate between them, for the Sum of 8000 Merks, “ de-
“ claring,

“ claring, that said Sum of 8000 Merks, and the Sum of 10,000
 “ Merks, formerly paid by him to his said Daughter, in name of
 “ Tocher, and for her Share of the Conquest, as granted by him,
 “ and accepted by her and her said Husband, in full Satisfaction
 “ to her of her Share of the Provisions, granted by him in the
 “ Contract of Marriage, between her deceased Mother and him,
 “ in favours of the Daughters of the Marriage, *failing Heirs-*
 “ *male*, and in full Satisfaction to her of the Provision of Conquest
 “ of Lands and Heritages whatsoever, which should be acquired
 “ during the Marriage, granted by him in favours of the said
 “ Daughters, *failing Heirs-male*, and in full Satisfaction to her, of
 “ her Portion-natural, Bairns Part of Gear, Share of Moveables,
 “ Legitim, or other Pretensions whatsoever, which she, as one
 “ of the only Daughters or Children of said Marriage, can any-
 “ ways ask, claim, or pretend Right to, by or through her said
 “ Mother's Decease, or his, the said *David Sinclair's* Decease, ex-
 “ cepting his own Good-will alienarly, and her Succession to his
 “ Estate, if the same should fall to her by Right of Blood, or any
 “ Settlement made, or to be made by him.” It dispenses with
 the Not-delivery, reserves a Power to alter, and was found in
Smithdon's Repositories after his Death.

Allowing, that, by these Words, *her Share of the Conquest*, was
 intended the Provision of Conquest in *Smithdon's* second Contract
 of Marriage, and, consequently, that, by Acceptance of that Por-
 tion, she was barred and excluded from claiming any Share of
 said Conquest, it is a clear Case, that she was not barred from her
 Claim to a Share of the 10,000 Merks, the Sum specially provided
 to the Issue of that Marriage, nor from her Claim of Legitim, both
 which were left as entire, as if no such Portion had been granted
 to her, and, therefore, it was, that, when *Smithdon*, by the after
 Deed in 1757, came to grant to her and her Children an additional
 Provision of 8000 Merks, he made it an express Condition, that,
 by her Acceptation thereof, it should be in full Satisfaction to her,
 not only of her Claim of Legitim, and Bairns Part of Gear, but
 also of the Provision of Conquest in her Mother's Marriage-con-
 tract, and of whatever other Claims might be competent to her as
 one of the Children of said Marriage, and, therefore, as her Ac-
 ceptation of that additional Provision, was the Condition *pro qua*
non of her being excluded from then her other Claims (the Provi-
 sion of Conquest only excepted) and as she has not hitherto ac-
 cepted

cepted of that additional Provision, it is equally clear, that all these her other Claims (the Provision of Conquest only excepted) remain entire at this Day; whether she will yet be advised to accept thereof, may in a great Measure depend upon the final Judgment which shall be given in the Question now depending between the Petitioner, the youngest Daughter, and *David Threipland*, one of *Southdun's* Heirs-general, as it is certain Fact, that the Provisions intended for the two Daughters of that Marriage, are very far short of what they were entitled to by their Mother's Contract of Marriage, and with which they have the greater Reason to be dissatisfied, that, as *Southdun* left no Issue-male, if his Estate had been allowed to go in the Course of legal Succession, they, as two of the Heirs Portioners, would have been entitled to an equal Share of the whole, with the Issue of his other two Marriages.

In this View, *Marjory* and *Katharine* having obtained themselves served Heirs of Provision to their Father, under their Mother's Marriage-contract, *James Sinclair* of *Durin*, as Assignee and Trustee for the Children of *George-Marjory*, deceased, only Son of the eldest Daughter, and your Petitioner, *Katharine*, brought an Action in this Court against the whole other Representatives of *Southdun*, in order to ascertain and make effectual their Relief of the Debts, due by *Southdun* at his Death, which were not contracted during the Standing of said Marriage.

A Counter-action was brought, at the Instance of *David Threipland*, the Scope and Tendency of which was, to evict the conquest Lands, upon this Ground, that the two Daughters of the second Marriage, by Acceptation of the Provisions destined to them severally, were barred from any Claim, in Right of the Provisions contained in their Mother's Contract of Marriage.

Which two Actions, coming before Lord *Auchinleck*, as no Appearance was made on the Part of *Marjory*, the Points disputed were these following: 1st, Whether *Marjory*, by her Marriage-contract 1748, had effectually discharged the Claim of Conquest, competent to her in virtue of her Mother's Contract of Marriage.—2^{dly}, Whether *Southdun's* Bond of Provision, in favours of the Petitioner, *Katharine*, in 1756, did, in like Manner, import a Discharge of her Claim under her Mother's Marriage-contract, supposing her to be the only remaining Child of that Marriage, unforsifamiliate, at the Death of her Mother, when the Provision of Conquest, in favours of the Issue of that Marriage, subject to their Fa-

ther's Liferent, took Place.—*Id.* Upon Supposition that the Claim of *Mary*, the eldest Daughter, was barred, and the Claim of your Petitioner, *Katherine*, not barred, whether your Petitioner, as the only remaining Issue of that Marriage, unforfeited, was entitled to the whole Provisions to the Issue of that Marriage, contained in her Mother's Marriage-Contract, with Allowance and Deduction of the *residua* Stocks, the Portion of *Mary*, the eldest Daughter, or, in other Words, whether *Mary's* Acceptation of the *residua* Stocks, as her Share of the Composit, did operate in favour of *her* herself, as a Discharge or implied Assignment to him of *Mary's* Part of the Provisions, to the Issue of that Marriage, or if it accrued to your Petitioner, the younger Daughter, as the only Issue of that Marriage remaining unforfeited at her Father's Death, fit as to entitle her to the whole Provision in that Marriage-Contract, deducting the *residua* Stocks given to *Mary* as her Portion.

And as this was thought in a great Measure, to depend upon this previous Question, in point of Fact, viz. For Acceptance or Non-acceptance of the Part of Provision granted in her Father's Will, it was averred, on the Part of *Elizabeth*, that *she* had actually accepted thereof, and a Candelabrum of Facts was exhibited, for intewing her Assertion, which she was ordered to confirm or deny, by a Writing under her Hand.

The Lord *Justice* Chief Justice, of this Date, pronounced the following *Verdict*: " Having considered the above Facts, with the several Writings thereunto referred to, viz. That Mrs. *Mary* and *Katherine* *Bartholomew*, the Parties Claiming, having been the only Children of the Marriage between *David* *Bartholomew* of Scotland, and Mrs. *Mary* *Thompson*, were entitled to full Implementation of the Provisions made for Children of that Marriage, in terms of the Marriage-Contract between those Parents, viz. to the *Issue* of *Mary*, and the whole that should be assigned during the Marriage, the Composit being directed to be what *she* *Thompson* should have in the Satisfaction of an, ever and above the Satisfaction he was then possessed of, and after Payment of all Debts as was then owing, or should be owing at the Dissolution of the Marriage; But And, that neither of those Daughters was entitled of the aforesaid Provision, in respect the Father, by the Contract of the Contract, had the Power of Disposition and, moreover, And, that though, in his Daughter *Mary's* Contract or Dis-

“riage, he settled 10,000 Merks upon her as her Share of the Conquest, which was effectual to cut out *Marjory* and her Heirs, who behoved to rest satisfied with the Division he made; he still continued bound to make good the Provisions to the other Heir of the Marriage, *Mrs. Katharine*, so far as *Mrs. Marjory's* Share had not exhausted them: And, before Answer to the Question, How far *Mrs. Katharine* was cut out from claiming her Share of the Provisions? appoints her to make distinct and pointed Answers to the Questions put to her by the Defenders, contained on a Paper apart, and to subscribe her Answers, and return them to this Process as soon as may be.”

Both Parties having represented against the foresaid Interlocutor, and your Petitioner having at the same time made Answers to the Facts put to her to confess or deny, respecting her Acceptance of the Bond of Provision granted in her favours, the Lord Ordinary, upon advising these, with the Answers, by Interlocutor of this Date, adhered to the former Interlocutor; and, upon the other Representation for *David Threipland*, also “adhered to the former Interlocutor, so far as it finds the Sums advanced to *Mrs. Marjory*, do not preclude *Mrs. Katharine* from claiming effectual Implement of the Obligation for Conquest, in so far as not implemented. And, further, having considered the Condescendence for the Defenders, and *Mrs. Katharine Sinclair's* Answers, and, more particularly, having considered, that it is an agreed Fact, that *Mrs. Katharine Sinclair*, at the Time of the alleged Transaction, was living in Family with her Father; that there is no Deed under her Hand renouncing her Claim on her Mother's Contract of Marriage; that it is not alledged, that she, after her Father's Death, ever made any Claim upon this Bond, or, even in her Father's Life, made any Claim upon it, finds, that she is not bound to accept of that Bond, and that her Claim, and the Pursuers, in her Right, to the Conquest, in terms of her Father and Mother's Contract of Marriage, remains effectual.”

March 10th,
1767.

Against which Interlocutor last above recited, *David Threipland* having presented another Representation, whereby he insisted, 1st, That *Marjory's* Renunciation of her Share of the Conquest, must operate a Discharge of the one Half, and restrict *Katharine's* Share to the other Half. 2^{dly}, That as *Katharine's* Acceptance of the Bond of Provision granted to her was sufficiently instructed, she must

must hold the same in Satisfaction of her Claim of Conquest. The Lord Ordinary, without appointing said Representation to be answered, pronounced this other Interlocutor: "Having considered this Representation, finds no sufficient Cause therein for altering the Interlocutor, and, therefore, adheres thereto, and refuses the Desire of the Representation."

Against these Interlocutors a Reclaiming Petition was presented upon the part of *David Threipland*, to which the now Petitioner put in Answers, upon advising of which, your Lordships pronounced this Interlocutor: "Find Mrs. *Katharine's* Acceptance of the Bond of Provision granted to her by *Southam* not instructed, and that she is not bound to accept of said Bond, neither is she obliged to hold the same in Satisfaction of her Claim to Conquest, and, in so far, adhere to the Lord Ordinary's Interlocutor reclaimed against, and refuse the Desire of this Petition: But, before Answer, as to the other Points in this Petition, viz. whether Mrs. *Marjory's* Renunciation of her Share of the Conquest must operate a Discharge of the one Half, and must restrict *Katharine's* Share to the other Half, appoints Parties to give in Memorials thereon, *hinc inde*."

Memorials being accordingly exhibited by both Parties, your Lordships, upon advising these, appointed a Hearing in Presence, and, Council being accordingly heard, you pronounced the following Interlocutor: "Find, that the Words of Mrs. *Marjory Sinclair's* Contract of Marriage in 1742, import a Renunciation and Discharge of the Half of the Conquest provided to her by her Father's Contract of Marriage in 1722, and, consequently, must restrict her Sister, *Katharine's*, Share of said Conquest to the other Half; and, therefore, prefer the Heirs of Line of *Southam* to that Share of the Conquest now in question, which would have fallen to *Marjory*, if she had not been excluded by her Contract of Marriage, and decreed."

The Question thereby determined is of such general Importance, the Consequences from thence obviously arising are of so dangerous a Nature, the Faith of Marriage-settlements, which have hitherto been looked upon as most sacred, will thereby be so effectually struck at, and the Difficulties which occurred to your Lordships in pronouncing that Interlocutor were apparently so great, that, the Petitioner persuades herself, she will need no other Apology for giving your Lordships an Opportunity of re-considering
this

July 26th,
1758.

this Point, in the View of which this Reclaiming Petition is humbly offered.

And, though she does not propose to disguise what she understands to have been the Meaning of this Interlocutor, *viz.* that the Provision made to *Marjory* in her Marriage-contract, and her supposed Acceptance thereof as her Share of the Conquest, was not only available to lay *Marjory* aside, but also to substitute *Southdun* himself in her place, so as to restrict the Petitioner to the other Half of the Conquest; she will be pardoned to say, that the Interlocutor, as worded, assumes certain Propositions which do not appear to have any just Foundation, though it is upon the Supposal of these, that the after Consequences are raised.

And, in order to explain what is thereby intended, the Interlocutor finds, that the Words of *Marjory's* Marriage-contract 1748, import a Renunciation and Discharge of the Half of the Conquest provided her by her Father's Contract of Marriage 1722, though there are no Words in *Marjory's* Marriage-contract, that your Petitioner can discover, that either says or implies, that the Half of the Conquest stood provided to *Marjory* by her Father's Marriage-contract.

And as there are no Words in the Marriage-contract itself upon which this Construction can be founded, a very small Degree of Attention will satisfy your Lordships, that it could not possibly be the Understanding of Parties, not even of *Southdun* himself, that *Marjory* was then entitled to a Half of the Conquest, and, consequently, that *Southdun* could intend to purchase from her an implied Discharge and Renunciation of that Half.

For though it is true, that, at that Time, there existed only two Daughters of that Marriage, and that, supposing no Alteration to have happened, and *Southdun* to have made no Division of the Conquest, the two Daughters might eventually be entitled to divide the Conquest between them, yet, as the Extent of the Conquest could not be ascertained till after the Dissolution of the Marriage, and that the Share belonging to each Child must have depended upon the Number of Children then existing; yet, as the Marriage did then subsist, and that several other Children might have been procreated of that Marriage, each of whom would have had an equal Share, if no Distribution was made by the Father; it is humbly submitted, with what Propriety it can be said,

that, in 1748, the Half of the Conquest stood provided to *Mary*, by her Father's Contract of Marriage 1722.

The Provision of Conquest, *liberis nascituris*, subject to the Father's Power of Distribution, could give no Right to any one Child, during the standing of that Marriage, to any determined Share; and, therefore, it cannot be true, as is here supposed, that, in 1748, *Mary* had Right to a Half of that Conquest, which was not provided to any one or more of the Children as Individuals, but to the whole *familia in communi*; and, if *Mary's* Share was not then ascertained to be one Half of the Conquest, it follows, by necessary Consequence, that *Nathaniel's* Share could not be restricted to the other Half.

So that, were your Lordships again to find, what seems to have been intended by this Interlocutor, it would, at any Rate, be proper to vary the Expression, as importing what, in the Nature of Things, could not possibly be true, than in 1748, *Mary*, under the Clause of Conquest in her Father and Mother's Marriage-contract 1722, was provided to the Half of the Conquest.

It might have merited a different Consideration, if after the Dissolution of the Marriage, when the *Quantum* of the Conquest could be known, *Nathaniel* had ascertained a precise Sum, or a certain Share, as *Mary's* Proportion of that Conquest, and had thereafter transacted with her for what Right or Interest she had therein; but as no such Division or Ascertainment was made in the 1748, when *Mary* received a Portion of *re. 50* Marks, the Expression in the Marriage-contract was quite proper, where that fixed Sum was given to *Mary*, *as her Share of the Conquest*, which, agreeably to the Words, as well as to what seems to have been the Intendment of Parties, can import no more, by any fair Construction, than *Mary's* Acceptance of that Sum, as the Share or Proportion allotted to her of the Conquest.

The Argument, upon the general Point, is one and the same, whether the Provision in a Marriage-contract, *liberis nascituris*, is of a determined precise Sum, payable at the Father's Death, or Dissolution of the Marriage, or of what shall be conquest and acquired during the Marriage, the Obligation upon the Father is one and the same in both Cases, and the Children have not a stronger Right in the one than in the other, while the Obligation stands *in statu juris contractus*, the Children have a *par evellit*, and, consequently, a Right of Action, either at their own Instance, or of those

those at whose Instance Execution is appointed to pass, to compel the Father either to settle and secure the Subjects conquest and acquired, in favour of the Issue of the Marriage; or, if the Provision is of a Sum certain, to vest the same in heritable Security, for Behoof of the Children of the Marriage; and, to this Effect, the Petitioner is advised, that no Service, or other active Title, is requisite to be established in their Persons, to compel the Father, or his Heirs, to implement the Obligation; but, when it is implemented, and the Estate or Provision settled and secured to the Children of that Marriage, as the *jus crediti* is extinguished by the Obligation's being performed, they must take as Heirs of Provision, and, in that Character, become liable, *suo ordine*, to all the Father's onerous Debts and Deeds, and the *jus crediti* is no longer effectual to any Purpose, but to guard against the Father's gratuitous or fraudulent Deeds, in prejudice of their Provision of Succession.

These, the Petitioner is advised, are so many incontestible Principles of the Law of *Scotland*; and therefore, taking it for granted, that it is of no consequence, upon the general Argument, whether such Provisions in a Marriage-settlement, *liberis nascituris*, are of the Conquest during the Marriage, or of a special determined Sum, secured to the Children at their Father's Death, or Dissolution of the Marriage, and as the Argument will be better understood, when applied to a specifick Sum, than to the Conquest, it shall, in the Sequel, be supposed that *Southdun*, by the Marriage-contract 1748, had been obliged to provide, settle, and secure 10,000 *l.* to the Issue of that Marriage, payable at his Death, and that, during the Standing of said Marriage, when there were two Children existing, *Southdun*, upon occasion of the Marriage of one of these Children, had given her a Portion of 1000 *l.* as her Share of the 10,000 *l.* the Question thereupon arising is, Whether, in such Case, *Southdun*, or his general Heirs, in accounting with the other younger Child remaining *in familia*, would be intitled to pocket up 4000 *l.* as the Share or Proportion belonging to the other Child, who had been forisfiliate? or, Whether, *e contra*, that Child's Acceptance of a specifick Sum, as her Share of the total Provision, can operate a Liberation to the Father, of the Obligation in his own Marriage-contract, in favours of the Issue of that Marriage, further, or to any other Effect than to have Credit and Allowance out of the total Provision of the Sum given to the other Child, as her Share of the total Provision? and, consequently, Whether he

does

does not remain bound to make good to the remaining Child, or Children, *in familia*, the Residue of the total Sum which, by the Marriage-contract, he stood bound to secure to the Children of that Marriage?

This, if the Petitioner does not mistake it, is, a fair State of the Question, and a Question it is of very general Importance to all Marriage-settlements, which hitherto have been deemed sacred and inviolable: it is upon the Faith and Credit that the Obligations therein contained, will be fully and fairly implemented, that Alliances by Marriage are made; the Interest of the Children yet unborn is the joint Care and Concern of the Friends on both Sides: they consider what Provisions are proper and suitable to be settled and secured to the Issue of the Marriage, according to their Rank and Quality, and the Circumstances of Parties; and as the Father is for the most Part the Obligant in these Provisions, Execution is generally provided to pass at the instance of some of the Wife's nearest Relations, for making affected to the Children of that Marriage, the Provisions thereby secured to them.

But if the View that is now maintained by the other Party, shall be finally established by Judgment of your Lordships, it must be apparent, that Marriage-settlements, however anxiously conceived, will be no better than to much waste Paper, and no earthly Security to the Children of the Marriage of the Provisions settled and secured to them, which every Father, the Debitor in these Provisions, will be enabled to cut and carve upon at pleasure, and whether to serve his own Views, or to gratify the ambitious Schemes of a second Wife, to rob the Children of the first Marriage of what was meant to be secured to them by their Mother's Marriage-contract.

There will be the unsolvable Consequences of the Doctrine established by your Lordships Jurisdiction. Children *in familia*, and under the Father's Power, stand upon very unequal Ground, he has the Power of distributing either the Provision of Conquest, or the Special Provision, by unequal Proportions amongst the Children of that Marriage, this gives him such an Absendant and Authority over them, that no one of them dare to strike out or refuse to assent to such Tyranny as he is pleased to offer.

Supposing the Provision to be 10000*l*. and the Children to be five in Number, whereby each of them upon an equal Division, as if no Division at all was made, would be entitled to 2000*l*. but the

the Father being disposed to restrict this Provision to a Half or a Fourth of the Sum, he attacks the Children one after another; to the first he offers 500*l.* as her Share of the 10,000*l.* if she refuses to accept, he gives her to understand, that he has it in his Power to make the Division in such unequal Proportions as he pleases; and if she will not accept of the Sum offered, as her Share of the 10,000 *l.* he will restrict her to some pitiful Sum: There is not one Child of a thousand, especially those of the Female-sex, that could have the Resolution to withstand such an Attack as this from a Father, under whose Power they are. She is, therefore, forced to submit. She accepts of the 500 *l.* as her Share of the 10,000 *l.* that Share upon an equal Division, would be 2000 *l.* the Father, by her Acceptance of the 500 *l.* comes in her Place, and thereby he gains to himself 1500 *l.* upon her Share.

That Point being gained, he pursues the same Game with the other Children, one after another, and by transacting with each separately, instead of making good a Provision of 10,000 *l.* to the *familia* of Children, the Sum in which they were secured by their Mother's Marriage-contract, he gives them but 2500 *l.* and pockets up the Remainder, whether for behoof of his general Heirs, or for the Children of another Marriage.

And it is, with Submission, no good Answer to say, that however practicable such Things may be, the Law entertains no Jealousy, that a Father will be guilty of any such Abuse with respect to his own Children, and that if any such fraudulent Practices shall appear, the Law will give redress.

What Fathers generally do, is not the Question, it is sufficient that such Wrongs may be committed, and Examples are not wanting where Fathers have acted with great Partiality, in Prejudice and Defraud of his own Children, in order to deliver himself from the Obligations he had come under by Marriage-settlements, especially in Cases such as this, where there are Children of different Marriages, one of which is generally favoured more than the others. This was *David Threipland's* own Language, when he challenged the Settlement of the Land-estate, and why speak a different Language now?

Southdun had made a strict Settlement in favours of a particular Series of Heirs; he wanted to aggrandize the Family-estate, and to lighten the Burdens upon it as far as possible. The Children of the second Marriage were entitled to the Lands conquest and acquir-

ed, during the flanding of that Marriage, he had, notwithstanding, taken the Rights and Securities of these in favours of his Heirs-general; and in order to prevent their being evicted by the Children of that Marriage, he fell upon this Device, first, in *Marjory's* Marriage-contract, of giving her a special Provision of no more than 10,000 Merks as her Share of the Conquest, and thereafter, of granting a Bond of Provision to *Katharine*, in full of her Share of Conquest, Legitim, and whatever else she could claim; and, last of all, of giving an additional Provision to *Marjory* and her Children, in order to bring her to a Par with the Petitioner.

But as all these Provisions are greatly short of what the Children of the second Marriage were entitled to by their Mother's Marriage-contract; the Question is, whether *Southden's* general Heirs, are entitled to stand in *Marjory's* Place, and in so far as the 10,000 Merks of Portion given to her, fell short of the Half of the Conquest, to take the Benefit thereof; and if your Lordships are satisfied that the Consequences of this Doctrine may be such as have been above-stated, it will at least have the Effect to engage your Attention to a more strict Examination of those Principles, which may lead into such dangerous Consequences.

And this leads your Petitioner to observe, that this is not the only Instance wherein the Law has been justly jealous of such Abuse of Power, even in the Hands of a Father; the Death-bed Law had for its Object, the securing the apparent Heir against Deeds cheated from Persons *in lectu agrotantis*.

To avoid the Effect of this Restraint, it was usual to take from the apparent Heir a forchard Consent and Approbation of any Deed or Settlement which he should think proper to make, even upon Death-bed, or *in articulo mortis*, this was what no apparent Heir durst refuse, where the Father or other Ancestor had an unlimited Fee, lest, in Case of a Refusal, he should be totally disinherited, and therefore the Law did, with great Justice and Propriety, deny its Sanction to every Deed of that Nature, importing a forchard Consent to validate Death-bed Dispositions, as *contra bonum consuetudinis*, and in which the apparent Heir was not a free Agent.

So also, in Marriage settlements, where special Sums are stipulated, to be secured for the Uses of the Marriage, but restricted to a lesser Sum by private latent Deeds, these being *contra fidem solationis nuptialium*, and therefore presumed to have proceeded from that Influence which the Parties themselves are supposed to

be under *in effu' amoris*, the Law, without any Examination into the Motives or Reasons of such Restriction, holds it to be fraudulent. *præsumptione juris*, and denies its Effect.

The same Principle applies with double Force to Cases such as the present, where a Father, meaning to disappoint the Children of a Marriage, of the Provisions he was bound to secure and make effectual to them, abusing the Power and Authority he has over them, puts them off with so much a lesser Sum than they were intitled to, and appropriates to himself and his Heirs-general the Bulk of their Provisions; hard would be the Case of Children of a Marriage, if a Device such as this was to be countenanced.

The Petitioner will therefore be allowed to assume it as an undeniable Proposition, that in Settlements by Marriage-contract, wherein Provision is made, whether of Conquest, or of a special Sum to Children of the Marriage, as it imports a Provision of Succession to take Effect at the Father's Death, not in favours of any particular Child, or even of the whole Children that may be procreated of said Marriage, thereby to constitute each Child Creditor in a rateable Proportion, *per capita*, from the Moment of Existence, but of such Children in a collective Body; the Father, who is the Debitor in that Provision, must make good the same to the Issue of the Marriage then existing, and has it not in his Power, by any Device, to withdraw from these Children, or appropriate to himself, any Part of that Provision.

So the Rule is laid down in express Words by *Erskine*, F. 368; his Words are: "No Provision granted to Bairns gives a special Right of Credit to any one Child, as long as the Father lives, the Right, is granted *familiæ*, so that the whole must indeed go to one or other of them, but the Father has a Power inherent in him to divide it among them, in such Proportions as he thinks best, yet so as none of them may be entirely excluded."

It is this inherent Power of Division, which however formerly doubted of by our greatest Lawyers, stands now established by the more recent Decisions of this Court, that distinguishes Provisions by Marriage-settlement from the Legitim, the one being the *provisio legis*, the other the *provisio hominis*: Thus far they agree, that they are both a Provision *familiæ*, it is the Children existing at the Father's Death, and unforisfamiliate, that are the Creditors, in both, such of the Children as predecease their Father, or are forisfamiliate

miliate during the Father's Life, do not transmit any Share to their Heirs, because the surviving their Father was a Condition, *fine qua non*, of their being intitled to any Share of the general Provision; the necessary Consequence of which is, that being withdrawn from that *familia* who were the Creditors in the Provision, whether by Death, or Foristamiliation, the total Provision continued to be due to such of the Children as are existing unforistamiliate at the Father's Death.

In the Case of Legitim, it is an agreed Point, laid down by all our Lawyers, and established by the Decisions of this Court, that where one or more of the Children have accepted of Provisions, in Satisfaction of their Legitim, and discharged the same, the Effect of such Discharge is not to infer or diminish the general Right of Legitim, in which the Children *in familia* at the Father's Death are the proper Creditors, or to substitute the Father or his Heirs-general, as in place of the Children to foristamiliate, but that the whole Legitim remains to be due to the other Children *in familia*, and, if such is the Law in the Case of Legitim, it is hard to discover any good Reason why the same ought not equally to obtain in the Case of Provision by Marriage-settlement, as it is the Children *in familia* at the Father's Death that are the Creditors in both, which are equally a Debt upon the Father's general Heir, to be made good out of his Means and Effects.

The only material Difference between the two, is, that the Law has ascertained the Right of Legitim to divide equally, *per capita*, amongst the Children existing *in familia* at the Father's Death, inasmuch, that though any one or more of these Children should discharge their Legitim, the Benefit thereof accretes to the other Children *in familia*: so that, if any one Child remains unforistamiliate at the Father's Death, he is intitled to the whole Legitim; whereas, in the Case of Provision by Marriage-settlement, though the whole Provision equally belongs to the Children *in familia* at the Father's Death, the Father is now understood to have an inherent Power of Division amongst these Children, but so as still to remain bound to make good the whole to one or other of them, allowing to each a certain Share or Proportion thereof.

Whether this Power of Distribution, in the Case of Provision by Marriage-settlement, has any just Foundation in the Principles of Law or Justice, may, with Reason be doubted, that, a Father, who, by his own Act and Deed, has constituted himself Debitor to the

the whole Children of a Marriage, and which, in the Nature of Things, must have been intended by the Parties to the Marriage-settlement, as a suitable Provision to the whole Issue of the Marriage, should have it in his Power to cut and carve thereon at pleasure, by giving the one Child a greater, to others a lesser Share of the Sum so provided.

This does not obtain, in any other Case to the Petitioner known, if any Person should establish such a Provision, whether by Marriage-settlement or otherwise, in favours of the Children of a Marriage, however gratuitous on the Part of the Donor, it is a clear Case, that unless such Power of Division was specially reserved, it would not be competent to the Donor to make any unequal Division or Distribution thereof, but the whole Children, existing at the Time, when the Provision takes place, would be intitled each to an equal Share.

Nay, what is more, suppose a Father should grant Bond of Provision to the whole Children of a Marriage, then existing, by Name, without reserving to himself any Power of Division, it is equally certain, that no Power of Distribution would in such Case, be competent, but each Child, existing at the Time when the Provision becomes due, would be intitled to an equal Share. From all which the Petitioner will be allowed to conclude, that the Power of Distribution ascertained to the Father by the later Decisions of this Court, in the Case of Provision by Marriage-settlement, has no other Foundation but the *patria potestas*, the Boundaries of which cannot easily be ascertained. The Dependence which Children have upon their Father, and the Provision being granted *familie*, whereby the Father may be understood fairly to have implemented that Obligation, when he makes good the whole Provision to the Children of the Marriage, though by unequal Proportions, giving to each a rational Share.

It has been already observed, that it is but of late Years that this Power of Distribution has been ascertained to be an inherent Right in the Father, who is himself the Debitor in the Provision. *Dirleton*, a Lawyer of the greatest Authority, under the Title, *Provision in favour of Bairns*, fol. 229, states this very Question, as a Point then justly doubted of, and clearly leans to the Opinion, that the Father ought to have no such Power of Division, but that the Provision should belong to the whole Children equally; and the *ratio dubitandi* is precisely what has been above observed of the

apparent Danger that this Power might be abused, particularly ; whereas, in the present Case, there are Children of different Marriages : for, after observing, that it might seem hard, that the Father should not have Power to make the Division among his Children, in order to render them dutiful to him, he remarks, on the other hand, " That the Provision being in favours of the Children, which is *nonnullum et universale* ; if that Power were allowed to a Father, it may be abused, and, intending to marry again, he might deal with one of his Children, and give him more than his Proportion : he may, by Transaction, settle all the Conquest on him, and take a great Part of it back from him, in Prejudice of the other Children." And this he confirms by Analogy, in the Case of Legitim : his Words are : " If that Provision there is a Legitim settled upon the Children ; and as the Father cannot prejudge them of that which is given them by Law, but the Bairs Part must divide equally, so he cannot prejudge them of that Bairs Part provided by Contract, unless by the same, the Father had that *arbitrium* and Power given to him as sometimes it is."

From this great Authority, these Conclusions may fairly be drawn. *1st*, That an Argument by Analogy, from the Case of the Legitim, to the Case of Provision by Marriage-settlement, is fair and just.—*2^{dly}*, That it is the *familia* of Children existing at the Time, who are the Creditors in both.—*3^{dly}*, That the whole Provision, whether of Legitim, or by Marriage-contract, must, in all Events, be made good to the Children.—*4^{thly}*, That the Power of Distribution, claimed by the Father, was not understood at that Period of the Law to have any just Limitation.—*5^{thly}*, That the most obvious Abuse from thence to be apprehended, was the Father's making private Transactions with some of the Children, by Means of which, he should withdraw from the whole Children a great Part of the total Provision to which the whole Children were entitled. How applying that is to the Case in hand, needs no Illustration, where the Tendency of the Plea, allowed of by your Lordships for the Tutor, is to appropriate to *Sarah* and his General Heir, as in place of *Mary*, one of the Daughters of his second Marriage, an equal Half of the whole Conquest, provided to the Children of that Marriage.

Nothing is so singular in this Opinion, that the Father had by Law no such Power of Distribution competent to him. The same Doctrine

Doctrine is laid down by Lord *Stair*, *lib. 5. tit 5. § 52.* his Words are: " A Clause of Conquest obliges the Husband to take all Lands, Annualrents, and Sums conquest during the Marriage, to himself, and the Heirs and Bairns of the Marriage, one or more, found to constitute all the Bairns of the Marriage, male and female, Heirs-portioners ; and that it was not alternative, that the Husband might either take the Conquest to himself, and the Heirs of the Marriage, or to himself and Bairns of the Marriage, at his Option ; and, therefore, having taken a considerable Sum in favours of himself, and the Heir of the Marriage, who was his only Son, yet, after his Death, his four Daughters of that Marriage obtained Decreet against their Brother, to denude himself of their Shares, 29th *January* 1678, *Stewart contra Stewart.*" Here the Father had taken it upon him, so far to exerce his supposed Power of Distribution, as to take the Security of a considerable Sum of Money, conquest during the Marriage, in favours of his only Son, one of the Children of that Marriage, which being challenged by the Daughters of the Marriage, as equally intituled under the Clause of Conquest in the Marriage-contract, the Father was found to have exceeded his Powers, and the Daughters intituled to an equal Share of that special Sum with their Brother.

The like Judgment was repeated in another Case, observed by *Forbes*, 9th *July* 1712, *Elizabeth Grant contra Patrick Grant of Dunlugas*, which being more directly in point to the Case in hand, the Petitioner will be pardoned to state it at greater Length.

In 1687, *Robert Grant of Dunlugas*, in his eldest Son's Contract of Marriage, had disposed his Estate to his said Son, with the Burden of 6000 Merks for Provision to his younger Son, *Andrew*, and his Daughter, *Elizabeth*, to be divided amongst them, and paid at such Terms, as the Father should appoint.—In 1693, *Robert*, the Father, in implement of said Obligation, assigned to his two younger Children, *Andrew* and *Elizabeth*, a Debt due to him by *John Campbell of Friartoun*; and he, and his Son, *Patrick*, did thereby further oblige them, to pay to *Elizabeth* 1000 Merks, declaring the Bond and Assignation to be in full Satisfaction to *Andrew* and *Elizabeth*, of all they could claim, through their Father's Decease, or their eldest Brother's Contract of Marriage. After the Death of the Father and Son, *Elizabeth* pursued the Son of her Brother, as representing his Father and Grandfather, for Payment of the 1000 Merks,

Marks, and the equal Half of the other 5000 Merks, wherewith her Brother was burdened by the Disposition to him of the Estate. —Pleaded for the Defender, that *Robert Grant*, the Father, had exercised his Faculty of Division, by giving the Pursuer 1000 Merks, in full Satisfaction, which effectually excludes her from all further Claim. —The Judgment of the Court was, That there is a *ius question* to the Pursuer by the Contract of Marriage, and that the Sum assigned by the second Bond of Provision (*viz.* the Debt due by *Campbell of Friar-toun*) proving ineffectual, she might repudiate the same, and thereby hath an Interest to claim an equal Share of the Provisions to the Children in her Brother's Contract of Marriage; and the *ratio decidendi* is thus expressed, “ That
 “ though the Father, by his Power of Division, might give more
 “ or less of the 6000 Merks to her Brother and her, *he was still*
 “ *obliged to give the whole between them*: If the Father had made
 “ no Division, the Son and Daughter would have had Right to
 “ the 6000 Merks, equally, and by just Proportions, which *ius*
 “ *question* could never be taken from them, but with their own
 “ Consent, *except upon Payment of the whole 6000 Merks to one or*
 “ *other, or both.*”

What is chiefly remarkable in the above mentioned Decision, is the Principle there assumed, that though the Father, by virtue of the Power of Distribution, specially reserved to him by the Deed of Appointment, had a Power to make an unequal Division, he was in all Events bound to make good the whole Provision, to both, or one or other of the Children, and that is precisely what your Petitioner contends for in this Case, *Southdun* was bound to settle and secure the whole Conquest to the Children of that Marriage; he gave to *Marjory* 10,000 Merks as her Share of the Conquest; and if, by Acceptance thereof, *Marjory* was forisfiliate and excluded from claiming any greater Share, does it not follow, by necessary Consequence, that the Residue of that Conquest belongs to the Petitioner, the only other Child of the Marriage, unprovided and unforisfiliate at her Father's Death.

The Petitioner at the same Time, does fairly acknowledge, that, however doubtful this Power of Division may have been, in the more early Periods of the Law, even as far down as the Times of Lord *Stair* and *Durleton*, it is now established by the more recent Decisions of this Court.

The first Case that occurred, where this Point, respecting the Father's Power of Division of a Provision in a Marriage-settlement, came to be disputed, was no earlier than the 10th *July* 1724, in the Case of *Douglas contra Douglas*, when the Father's Power of Division, was affirmed. The same Judgment was repeated in the Case of *Dowie contra Dowie*, 9th *January* 1728. And which being again called in question, in the Case of Colonel *Campbell's* Settlement, 16th *December* 1738, the Judgment of the Court in that Case was " That each of the Children are intitled to a Share " in the special Sum and Conquest, but that the Father had a " Power of Division of the Sum and Conquest among his Chil- " dren, *in such Manner as might be found rational*, and therefore " that he might lawfully acquire a Land-estate, and take the " Rights thereof to his eldest Son, and might also dispoise his " moveable Estate to him, with the Burden of rational Provisions " to his younger Children."

In all these later Decisions, establishing the Father's Power to make a rational Distribution among the Children of the Marriage, it was manifestly implied and understood, that the whole Provision must be made good to one or other of the Children, and that the Father had it not in his Power, by any Stratagem or Device, to appropriate any Part thereof to himself; your Lordships will not presume, that *Southdun* in this Case intended to defraud his Children of the second Marriage, of what justly belonged to them, and if that shall be supposed to have been his Intention, the Law will give no Countenance to it; the Clause in *Marjory's* Contract of Marriage giving her 10,000 Merks, as her Share of the Conquest, may fairly be construed as importing no more, but the appropriating to her that Sum, as in full Satisfaction of all that she should be intitled to take of the Conquest, as one of the Children of the Marriage, and thereby to withdraw her from among the Number of the Children, to whom the Residue of that Conquest was to be made good, but by no Means to substitute *Southdun* himself, or his General-heirs, as in *Marjory's* Place, *quoad* the one Half of the Conquest, as supposing her implied Discharge, by the Acceptance of that Division, to operate a Conveyance of her Half of the Conquest to *Southdun* himself, for a Restriction of the other Childrens Right; the Injustice of which cannot be better illustrated than in the supposed Case, that the Provision had been of a specifick Sum of 10,000 *l.* and that by giving a Portion to

Major of 10,000 Marks, as her Share of that Provision, *Southam's* General-heirs, under Colour and Pretence of the implied Discharge and Renunciation, by *Major's* Acceptance of that Provision, should withdraw from the other Child of that Marriage, the only remaining Creditor in that Provision, one just and equal Half thereof.

The Petitioner will be allowed to illustrate the Injustice that in many Cases would arise, was this Principle to be established, from the following Consideration: The Provision of Conquest is quite uncertain, both as to the Extent thereof, and the Number of the Children who shall have Right thereto at the Father's Death. One of these Children comes to be married in the Father's Lifetime; he knows what his Funds then are, and what Proportion thereof, by a rational Division, would fall to the Share of that Child, according to the State of his Family, as it then stands; he accordingly gives her a Portion in Satisfaction of her Share of the Conquest, whereby the Number of Children *in familia*, intitled to the Residue of that Conquest, are reduced to the Number of four. Three of these afterwards die, whereby there remains but one. This was an Event which the Father could not possibly foresee; the Conquest eventually proves to be worth 10,000*l.* the Portion given to the married Child, rational to the State of the Family as it then stood, is but 500*l.* but as supposing the married Child not to be fori-familiate, she would have been intitled to 5000*l.* as her Half of the total Conquest, though she herself is barred from claiming any more than the 500*l.* already received; the Father steps into her Place, and claims the 5000*l.* as her Share of the total Conquest, deducting the 500*l.* which she had received, and accepted of as her Share of the Conquest, whereby, instead of making good the whole Conquest to the Children of the Marriage, he withdraws nearly one Half of the total Sum. How consistent this would be with the *bona fides* of Marriage-settlements, and the Security thereby intended to the Children of such Marriages, is too obvious to require Illustration; it would give the Father, in every such Case, such an absolute Power to defeat his own Obligation, and the Security intended by Marriage-settlements, as in most Cases would be productive of the highest Injustice and Violation of the Security stipulated by the Friends of both Sides for the Children of the Marriage.

The Wife's Third of Moveables furnishes another Example to the same Purpose: She receives a Liferent-provision, heritably secured upon the Land-estate, which she accepts of in Satisfaction of her Third of Moveables, and every other Claim competent to her, the Effect of which is totally to exclude the Wife from any Share of the Moveables, as having already received what she accepted of in Satisfaction thereof: But the Consequence of that Renunciation, is not to benefit the Heir; tho' the Liferent Annuity is a Burden upon him and his Estate, he does not thereby come in place of the Relict, so as to be intitled to claim her Third in the Division of the Moveables, but her Interest being withdrawn, the Executry receives a tripartite Division, in the same Manner as if the Wife had never existed; the Legitim and Dead's Part is thereby increased, and the eldest Son and Heir will take nothing, though the Wife's Renunciation was purchased by an equivalent Consideration given upon the Land-estate.

The Succession *ab intestato* is governed by the same Rule: If a younger Son has Land disposed to him by his Father, in Satisfaction, not only of his Legitim, but of his Right of Succession to the moveable Estate, as one of the younger Children, and nearest of Kin, the elder Brother and Heir would not be intitled to come in place of the younger Son, who had been thus forisfamiliate, though he had paid the Price of the younger Brother's Renunciation; any Benefit from thence arising, would increase the Executry for the Advantage of the younger Children.

There is a very remarkable Decision to this Purpose, in the Case of *Sandilands contra Sandilands*, 27th January 1690, extremely apposite to the Case in hand. *Sandilands*, in his Daughter *Agnes's* Contract of Marriage, gives her a Tocher, proviso, that she should notwithstanding thereof be a Bairn of the House, and have her Share with the other Bairs of the Family.—In the Marriage-contract of *Rachel*, another Daughter, he also gives her a Tocher, which she accepts in full Satisfaction of her Portion-natural and Bairs Part of Gear, and *all that she can succeed to by the Death of her Father, any Manner of Way*; the Father dying intestate, a Competition arises between *Agnes* and *Rachel*; the Commissaries prefer *Agnes*, in respect that, by the Quality annexed to the Tocher she had received in her Marriage-contract, it was provided she should still be a Bairn of the House, whereas *Rachel* had accepted of her Portion in Satisfaction of all that she could succeed to by
the

the Death of her Father. In the Reduction of the Commissary's Decree, it was pleaded for *Rachel*, that the Commissaries had committed Iniquity in excluding her, because, where there are more Co-heirs or Bairs, if all of them accept Tochers, in full Satisfaction of what they would succeed to by their Father's Death, the Renunciation being in favours of their Father, it returns back to them by his Death, and would not belong to any other Relation or Appoint of the Father, as the farther Degree can never succeed while there is a nearer; and her Acceptance in Satisfaction could operate no more but a Power to the Father freely to dispose of the Dead's Part, which he not having done, her Part thereof must return to herself, and this the rather, that there being no other Children but her and *Agnes*, the Condition annexed to *Agnes's* Acceptance of her Provision, that she should be a Bairn in the House, and have her Share with the other Bairs, must have intended that she should come in equally with *Agnes*, there being no other Bairn in the House with whom she could share; and that supposing she should be found thereby intitled to the Bairs Part, it could give her no Right to the Dead's Part. It was answered for *Agnes*, that, howbeit, where all the Children renounced their Interest in the Father's Succession, it returns to them all, where he has not otherways disposed thereof;—that holds not where some renounce, and others not; for then the Renouncer's Share accretes to those who do not renounce; and Judgment accordingly went in favours of *Agnes*, upon this Principle, that her Acceptance in Satisfaction, accrued to the other Children intitled to the Dead's Part.

And such being the Rule in all the other Cases above stated, no good Reason occurs, why a Provision *familiæ*, in a Marriage-contract, should be governed by a different Rule.

It was said, that this would be hurtful even to the Interest of the Children themselves, as it would bind up the Father's Hands from making rational Transactions with his Children, when Occasion required they should be settled in Marriage, or otherwise.

But this is quite groundless and imaginary. Fathers seldom exceed in giving larger Provisions to their younger Children in their own Lifetime, than their Circumstances can bear; and as, in making good the Provisions, they will have Credit for what they have thus given to one or more of their Children in their own Lifetime, he can never suffer Prejudice thereby, as, first and last, he will

will be liable no further than the total Sum provided in the Marriage-contract, or Value of the Conquest; but that this should intitle him to with-hold from these Children so large a Share of what, by their Mother's Marriage-contract, was provided to the whole Children of that Marriage, and to appropriate the same to himself, or to his General-heirs, is contrary to every known Principle of Law or Justice.

The only other Particular which remains to be considered, is the Decision in the Case of *Allardice*, where the Judgment of this Court, in a similar Case, affirmed upon the Appeal, is said to have been such as is now contended for by the other Party.

Case of Allardice considered.

It is at best but a single Decision, and at a Period when the Principles of Law were by no means fixed and established; but when the Specialties attending that Case, as now to be stated from the Informations that were exhibited, shall be duly attended to, the Petitioner persuades herself, that your Lordships will not think it is of that Weight as ought to prevail with your Lordships to give a Judgment contrary to what you would otherwise be of opinion is more agreeable to the Principles of Law and Justice.

It has been already observed, both from Lord *Stair* and *Dirleton*, that, as the Law was then understood, a Father had no more Power of Division of the Provisions *liberis nascituris*, in his Marriage-contract, than he had of the Legitim, and that as the one was the *provisio legis*, the other the *provisio hominis*, to the uncertain Issue of a Marriage existing at the Father's Death, they both stood upon the same Footing, and were to be governed by the same Rules, each Child taking *per capita*. It was not till the 1724, in the Case of *Douglas contra Douglas*, that the Father's Power of Division came to be ascertained, and which was ultimately settled in the 1738, in the Case of Colonel *Campbell's* Children.

So that, when the Case of the *Allardices* received the Judgment of this Court in the 1720, and the Judgment of the House of Lords in the 1721, it was understood to be Law, that, where a Power of Division was not reserved to the Father in the Deed itself, the Children were intitled each to an equal Share of the Provision.

The Case there was, that *John Allardice*, by his first Contract of Marriage, in 1683, besides the special Sum of 6000 Merks, became bound and obliged, that whatever Lands, Heritages, Debts, Sums of Money, and others, that he should conquest, acquire, or suc-

cred to, during the standing of that Marriage, should be settled and reserved to the Heirs of that Marriage: and I thought it came to be a Question, Whether, by the Word *Heirs*, was intended the eldest Son, or the whole Children? it was hold, that all the Children were Heirs of Provision under that Settlement.

It appears, that that Marriage being dissolved by the Wife's Death in 1700, leaving Issue two Daughters and a Son, the Father's whole Fortune, about that Period, amounted to 18,000 *l. Scots*, or thereby; that he had given 12,000 Marks, and a House in *London*, to his Son, which exceeded his Third of the whole Provision, whilst, at the same time, on occasion of their respective Marriages which happened after the Dissolution of his own first Marriage, he had given 4000 Marks to each of his two Daughters, in full of all they could claim.

After the Death of the first Wife, *John Martinie* intermarried with *Jess Scott*, and in the Marriage-contract with her, he became bound and obliged to settle and secure to himself and her, in Conjunction for and Different, and to the Children to be procreate of said Marriage in Fee, 15,000 Marks of his own, 7000 Marks being the Wife's Portion, and all Lands, Hereditaments, &c. Goods and Chats, Inheritable and moveable, which he should happen to conquest and acquire, during the standing of the said Marriage.

Of this Marriage there were no less than nine Children, and as the Son of the first Marriage, was Creditor under the first Marriage-contract, was pleased to disjunct the Provision to the Wife and Children of the second Marriage, various Points thereupon arising became the Subject of Litigation: and, amongst other Particulars, as the Father's Effects, at the Dissolution of the first Marriage, were nearly to the Amount of 18,000 *l. Scots*, and as the Portions given to the Daughters of that Marriage, was no more than 4000 Marks to each, the Son of the first Marriage did set up a Claim to the whole Provision in the first Marriage contract, amounting nearly to 18,000 *l. Scots*, deducting only the 8000 Marks which had been made good to the Daughters of that Marriage.

This was disputed by the Widow and Children of the second Marriage, no Power of Division was reserved to the Father by the Marriage-contract. As the Law then stood, a Father was not considered to have any such Power of Division, where such Power was not specially reserved in the Deed itself; two of the greatest
Lawyers

Lawyers of this Country had given it as their Opinion, that the Father had no such Power when not reserved; it was an established Point, that he had no such Power with respect to the Legitim; the Analogy between the two was extremely strong, and the Son had actually received his full Proportion of the total Provision; and in one of the printed Cases to the House of Lords, it is stated in so many Words, that when the Father gave to the Son the 10,000 Merks, and Fee of the House in *Aberdeen*, the same was expressly declared to be in full of all he could claim by his Mother's Contract of Marriage, or any other Way. Whether it truly did contain such Declaration, the Petitioner cannot take upon her to say, as she has had no Access to see any of the Deeds themselves, but she cannot conceive how such a positive Averment should have entered the Case, if the Fact had not been so; and, accordingly, upon Supposition of the Father's having no Power of Division, it was argued for the Wife and Children of the second Marriage, that supposing the whole 18,000 *l.* had been conquest during the Marriage, the Pursuer could claim no more than a third Part thereof, he being but one of three Bairns of said Marriage, and could not deny that he was provided in 10,000 Merks, which was more than a Third of the Whole; so that although the Father had agreed with the two Daughters, and obtained their Discharges for a lesser Sum, he cannot claim the Benefit thereof, since *nihil illi deest*, clearly supposing that each of the three Children were entitled to equal Shares of the whole Provision.

Nor is it indeed possible to make Sense of the Judgment it self upon any other Supposition, where it finds that the "Provisions in favours of the Heirs of the first Marriage, are to be understood in favours of the Children of the Marriage, of which there being three in Number, and two of them having accepted of the special Sums from their Father, in Satisfaction of all they could claim by virtue of the said Contract," the Pursuer was only entitled to claim a third Share of these Provisions, clearly supposing, that as no Power of Division had been reserved by the Father, each Child was entitled to an equal third Share.

Another Specialty attending that Case was, that as the Mother was dead, and the Extent of the Conquest ascertained, whereby each Child became, *de jure*, entitled to a third Share, if no Division

sion was made by the Father, it was not unreasonable to think, that in a Case attended with so many Specialties, when the Father came to settle each of these Children, and to give them a certain Provision, it might be understood, that he meant to acquire, and they to grant a Discharge of their Shares, holding each to be entitled to a Third of the Whole.

It seemed to be intimated, that the Portions here given to the two Daughters, and Transaction made with them, did not happen after the Dissolution of *John Alcock's* first Marriage; but the Fact cannot seriously be disputed, and is directly established by the Information given in to this Court, on the Part of the Defendants, in that Action, where the following Passage occurs, "In the present Case, there being three Children, Law does give every one of them an equal Share; and the Father having bred the two Daughters, and been at the Expenses of their Marriage, ever *since the Dissolution of his first Contract*, (whereby the Contract was dissolved, they being first and last *married together*;) it is but most reasonable and just, that the Children of the second Marriage, should have the Benefit thereof, since the Contract to which they were provided, was thereby diminished, rather as *those of the first Marriage, who was bred and entertained by the Contract in the second Marriage, with his said two Sisters.*" — This shews the Case to have been just as if separate and distinct Bonds had actually been granted to each of the three Children for a stipendium, precisely equal to their respective Thirds of the Contract; in which Case, it cannot be disputed, that an Abatement given by any one or two of these separate and distinct Creditors, could have no Influence to enlarge the Debt due to the third or remaining Creditor, or operate in his favour, but could only operate in Favour of the Debtor, by whom the Bond discharged was granted.

But if the Judgment of the House of Lords in that Case, affirming your Lordships Decree, had been more in point than it is, and must be held as Law in that particular Case, it is humbly submitted, whether it ought to prevail over so many other Authorities, Precedents, and Principles; and where the establishing this Proposition might be attended with Consequences so pernicious to

every Marriage-settlement, wherein Provision is made for the Issue of the Marriage.

May it therefore please your Lordships, to alter the Interlocutor last above recited, of Date 26th July 1768, and to find, that, as Southdun was bound by the Obligation in his Marriage-contract with the Petitioner's Mother, to settle and secure to the Issue of that Marriage, not only the special Provision of 10,000 Merks, but also the whole Conquest during said Marriage; and that Marjory, the eldest Sister, having accepted of 10,000 Merks as her Share of the Conquest, the Residue of that whole Provision accrued to the Petitioner, the only unforisfamiliar Child of that Marriage, and that Southdun's Heirs, in accounting therefor, can only have Credit for the 10,000 Merks paid to Marjory; and to remit to the Lord Ordinary to proceed accordingly.

According to Justice, &c.

ALEX. LOCKHART.

A N S W E R S

F O R

DAVID THREIPLAND - SINCLAIR of *Southdun*, and STUART THREIPLAND of *Fingask*, his Administrator in law ;

T O T H E

PETITION of Mrs. KATHARINE SINCLAIR, second lawful daughter of the deceased *David Sinclair* of *Southdun*, by Mrs. *Marjory Dunbar*, his second wife, and of *James Sinclair* of *Duran*, her Trustee.

DAVID SINCLAIR of *Southdun* was thrice married : By his first wife, Lady *Janet Sinclair*, whom he married in 1714, he had two daughters, viz. *Jean*, the eldest, who married Sir *William Dunbar* of *Westfield*, and died in 1749, leaving an infant daughter, who also died in 1750, and *Janet*, the second, who married *Stuart Threipland* of *Fingask*, and died in 1755, leaving two children, *David Threipland-Sinclair*, the respondent, and a daughter *Janet*.

IN 1722 *Southdun* entered into a second marriage with Mrs. *Marjory Dunbar*, daughter of Sir *Robert*, and sister of Sir *Patrick Dunbar* of *Northfield*, by whom he had also two daughters, *Marjory* and *Katharine* : *Marjory*, in 1748, married her cousin *John Dunbar*, eldest son of the said Sir *Patrick Dunbar*, by whom she had no issue ; and he dying in 1751, she married *James Sinclair* of *Harpisdale*, by whom she had a son *George*, now dead, and four daughters,

daughters, who survived her, she herself having died in the 1703; *Katharine*, *Southdun's* second daughter of that marriage, is yet unmarried, and is the pursuer in this cause.

In the 1756, *Southdun* entered into a third marriage with Mrs. *Margaret Murray*, by whom he had an only daughter, *Margaret*, born in 1758, still living. *Southdun* himself died in March 1760, leaving his third wife a widow, who is now married to Mr. *John Giblin*.

On occasion of these three different marriages, different settlements were made by *Southdun*; particularly, upon his second marriage with Mrs. *Marjory Dunbar*, he became bound by contract to invest her in the life-rent of lands worth 500 merks of yearly rent, and to provide the children of the marriage in the sum of 10,000 merks, "To be divided and distributed among them by their father, with consent of their mother, during their lifetime; and failing such distribution and division, by two of the nearest of kin on the father's side, and two of the mother's side, the eldest son's provision always not under the sum of

" All which provisions are to be
 " paid at the first term of *Whitsunday* or *Martinnus* next after the
 " said *David Sinclair* his death, under the penalty of a fifth part
 " of each child's provision, in case of failzie, and the annual-rent,
 " after the term of payment; with this provision, that notwithstanding of said term of payment, yet the children's provisions,
 " according to the distributions and provisions above written,
 " shall not fall due, in whole or in part, until their necessary aliment, education, or settlement to any employment shall require it, or until their marriage or majority; all which the said *David Sinclair*, for obviating pleas, is allowed to explain
 " by a paper under his hand, after the children's existence; or
 " failing thereof, to be determined by two of the nearest in kin
 " of the father's side, and by two of the nearest in kin of the mother's side, as above; and in case it shall please the said *David Sinclair*, or his heirs, to pay the said provisions rather in land than in money, then, and in that case, it shall be lawful to the said *David Sinclair*, or his heirs, to dispose in their favours
 " such a part of his estate, in lieu of the said 10,000 merks, as he
 " and the persons at whose instance execution is allowed to pass, in
 " manner after mentioned, shall agree; and failing thereof, after his
 " decease,

“ decease, by two of the friends on the father’s side, and two on the mother’s side. And the said *David Sinclair* binds and obliges him to aliment and educate the children during his lifetime, according to their quality : And whatever lands, heritages, sums of money, or others whatsoever it shall happen the said *David Sinclair* to conquest and acquire, during the marriage, he binds and obliges him to provide and secure the same in manner following, viz. the one half to the said *Mrs. Marjory Dunbar* in liferent, for her liferent use allenarly, during all the days of her lifetime ; and that by and attour her liferent provision above written, and the whole to the children of the marriage in fee, *to be divided among them, in manner above mentioned* :—Declaring, that nothing shall be reputed conquest but what he shall be worth at the dissolution of the marriage beyond his present land estate, and after payment of all his just and lawful debts, *already contracted*, or to be contracted by him during the marriage ; and it is hereby provided and declared, that the free moveables shall be divided according to law.”

IN the 1748, *Mrs Marjory Sinclair*, *Southdun’s* eldest daughter of this second marriage, having intermarried with her cousin german Mr. *John Dunbar*, son to the said *Sir Patrick Dunbar*, while her mother, *Southdun’s* second wife, was still living, a contract of marriage passed between them, to which *Sir Patrick* and his son were the parties on the one side, and *Southdun* and his daughter on the other. By this contract, which was wrote by the bridegroom himself, *Southdun* “ bound and obliged him and his heirs and executors, to content and pay, in name of tocher with his said daughter, and as her share of the conquest, to the said *Sir Patrick Dunbar*, his heirs or assignies, secluding executors, the sum of “ 10,000 merks Scots,” by equal portions at the terms of *Martinmas* 1749, and *Martinmas* 1750, with penalty and annualrent of the whole, from *Whitsunday* then next, during the not payment. The sum so provided was accordingly paid to *Sir Patrick Dunbar*, who, your Lordships will observe, was the brother of *Southdun’s* second lady, and upon his father’s death came to be possessed of her duplicate of the marriage contract 1722 : *Sir Patrick* and his son *John* were also the two nearest of kin to the children of that marriage on the mother’s side, and being perfectly acquainted with

the

the terms of *Southdun's* contract 1722, they considered the 10,000 merks thus advanced in tocher with *Marjory* the eldest, to be a full and ample equivalent for her share of the conquest provided to her by that contract; especially, as the amount of such conquest, as well as the term when it could be recovered, was altogether precarious and uncertain.

HOWEVER, the said *John Dunbar* having died soon after his marriage, Mrs. *Marjory* was again married in September 1751 to Mr. *Smclair* of *Harpfdale*, when, upon her renouncing the life-rent that had been provided to her by Sir *Patrick Dunbar*, he, Sir *Patrick*, repeated the tocher of 10,000 merks to her and *Harpfdale* her second husband, by whom she had several children, as already observed.

SOUTHDUN's second lady having died some time thereafter, and he being about to enter into his third marriage in 1756, it was thought proper both by *Southdun* himself, and Sir *Patrick Dunbar* the uncle and nearest relation on the mother's side to the children of the second marriage, that as he had eight years before given a provision to *Marjory* the eldest daughter of that marriage in satisfaction of her share of the conquest, he should likewise give a bond to *Katharine* the other daughter, and thereby finally acquit himself of the obligation he had come under by his contract 1722, in favours of the children of that marriage.

July 19.
1756. ACCORDINGLY *Southdun*, of this date, granted a bond to the said Mrs. *Katharine* the petitioner, for 1000 l. Sterling, payable to her, her heirs, &c. at the first term after his death, and became bound in the mean time to aliment her in his family, and furnish her with cloaths and other necessaries, or, in his option, to pay her 30 l. Sterling yearly, to buy such cloaths and necessaries. The bond also bears to be granted by *Southdun*, and accepted by Mrs. *Katharine*, " in full satisfaction to her of her share of the provisions granted by him in the contract of marriage betwixt him " and his said deceased spouse, in favours of the daughters of that " marriage, failing heirs male, and in consideration and full satisfaction to her of her share of the provision of conquest of lands, " and heritages, and others whatsoever, which should be acquired " during the marriage, granted by him in favours of the daughters of " the said marriage, failing heirs male; and in consideration and full " satisfaction

"satisfaction of her portion natural, bairns part of gear, &c." Of all which, and of all her pretensions, except his own good will, and her succession to his estate, if it should fall to her, the petitioner, by her acceptation thereof, was declared to be bound to discharge her said father.

To this bond, the said Sir *Patrick Dunbar* and his son-in-law *James Sinclair* of *Duran* (now Mrs. *Katharine's* trustee) are the instrumentary witnesses; it was delivered to Sir *Patrick*, who put it into the young lady's own hands, and she again returned it to him, by whom it was soon after put upon record, and one extract was paid for, delivered to, and kept by the petitioner herself.

WITHIN two days after granting this bond, *Southdun* entered ^{July 21.} into a postnuptial contract with Mrs. *Margaret Murray* his third ^{1756.} wife; whereby he, *inter alia*, provided to the heirs male of that last marriage, the whole lands and heritable subjects then pertaining to him, including the whole subjects that had been conquest and acquired during his second marriage, and which are now claimed by the petitioner. To this last contract, the said Sir *Patrick Dunbar* the petitioner's uncle, and *James Sinclair* of *Harpdale* her brother-in-law, were instrumentary witnesses: From all these facts it is manifest, that these gentlemen, as well as *Southdun* himself, were then perfectly satisfied, that *Southdun* had fully discharged the obligations of his second contract 1722, and that neither of the two daughters of that marriage could have any further claim upon him for conquest, or otherways.

HOWEVER, in the year following, *Southdun* made a voluntary addition to the provision of Mrs. *Marjory*, the eldest daughter of that second marriage. It has been already noticed, that she had several children by *Harpdale*, her second husband; and although 10,000 merks paid down to her in the 1748, was eventually equal to 18,000 merks provided to the petitioner at *Southdun's* death, which did not happen till the 1760; yet *Southdun* thought fit, from regard to his eldest daughter and her issue, to give her such an additional provision, as should make her capital equal to that of her sister the petitioner.

ACCORDINGLY, *Southdun*, of this date, granted a bond of ^{Sept. 28.} provision in favours of Mrs. *Marjory* and her husband, in con- ^{1757.} junct fee and liferent, for their liferent uses allanarly, and to their

children in fee, for 8000 merks, payable at the first term of *Whitsunday* or *Martinmas* after his decease, with interest thereafter.— This bond proceeds upon the narrative of the affection he bore to his daughter; and that the provisions made for the younger children, procreate or to be procreate betwixt her and *Hampdale*, were too mean; and that he therefore thought proper to add the sum of 8000 merks to their provisions, with the burden of their father and mother's lierent. It likewise declares, "That the said sum of 8000 merks, and the sum of 10000 merks, formerly paid by him to his said daughter in name of tocher, and for her share of the conquest, are granted by him, and accepted by her, and her said husband, in full satisfaction to her of her share of the provisions granted by him in the contract of marriage betwixt her deceased mother and him, &c." The bond also contains a dispensation with the delivery, and a reserved power to alter, and was found in *Southdun's* repositories at his death.

YOUR Lordships will further recollect, that *Southdun* having left no issue male of any of his marriages, the succession to that part of his estate which he had contracted to the issue of his first marriage with Lady *Janet Sinclair*, and also of certain other parts of his estate, which he had conjoined therewith in his tailzie 1747, devolved upon the respondent *David Threipland* his grandson, by *Janet* his daughter of the first marriage: That *Marjory* and *Katharine*, the daughters of the second marriage, were understood to be paid off, and provided by the deeds above recited; that *Margaret*, the only child of the third marriage, was by her mother's contract provided to a portion of 12500 merks; that his executory was insufficient to answer the debts affecting it; and that the residue of his heritable subjects falls to his surviving daughters, and the issue of such as are dead, as his heirs portioners and of line, subject to *Southdun's* debts, so far as not cleared out of the executry.

BUT the petitioner, the surviving daughter of the second marriage, in concurrence with a trustee for the children of her sister *Marjory*, have thought fit to set up a separate claim to such lands and other subjects as appear to have been conquest and acquired by *Southdun* during the subsistence of his second marriage, which is now the subject of the present action.

AGAINST this action the respondent maintained two separate defences. *1mo*, That Mrs. *Marjory* had accepted at her marriage of a portion in full of her share of the conquest; and that Mrs. *Katharine* had also accepted of the bond of provision granted by her father to her in satisfaction of any such claim. *2do*, That supposing Mrs. *Katharine* had not accepted of the said bond, yet she could only claim the one half of the conquest, subject to the debts affecting the same, in respect that her sister *Marjory* who survived her mother, and was intitled to the other half, had discharged her father thereof.

THE *first* point, as to Mrs. *Katharine's* acceptance of her father's bond of provision, is now finally determined; so that in this argument it must be held that her claim is not barred by the said bond, which she has not accepted of; and consequently, that she may still insist upon her right, under the clause of conquest contained in her father and mother's contract of marriage: So that the only remaining question is, Whether she is intitled to the whole conquest, so far as not exhausted by what was paid to her sister *Marjory*; or if she can only be intitled to the one half, in respect of *Marjory's* acceptance of a sum from her father in full of her share?

IT is unnecessary to recapitulate the steps of procedure, which are fully recited in the petition; your Lordships have decided in favour of the respondent, by determining the last of the above mentioned alternatives to be agreeable to the principles of law; so that Mrs. *Katharine's* claim is restricted to a half of the conquest only, without allowing her to derive any benefit from that transaction which intervened betwixt her father and sister, to which she was no party.

MRS. *Katharine* has reclaimed against this interlocutor, and in answer to her petition, the following observations are humbly submitted on the part of the respondents.

THE petition sets out with taking exceptions against the interlocutor, in so far as it proceeds upon *Marjory's* being creditor to her father in the half of the conquest in the 1748, at the date of her marriage contract; whereas, neither then, nor indeed till after the dissolution of the marriage, could it be ascertained what

was

was the extent of the conquest, or what was the share due to any one particular child.

BUT the respondents do humbly beg leave to maintain, that the cavil here suggested is without any just foundation; and that *Mary*, at the date of her marriage contract in the 1743, was truly creditor to her father in the one half of the conquest.—The fallacy of the petitioner's argument, arises from confounding together two things, which are, in themselves, extremely distinct, namely, having a *jus crediti* to a *share* of the conquest, and having a *jus crediti* in a *precise sum* of conquest. It may be true, that in the year 1743, *Mary* could not be creditor to her father in a precise sum of conquest, because the *quantum* might increase or diminish, previous to the dissolution of the marriage, either from the after deeds of the father, or from the increase and diminution of the children of the marriage; but there is surely no inconsistency in being creditor in a *share*, whether a half, a third, or a fourth, although the *precise quantum* of that share is not ascertained.

If the petitioner controverts this proposition, his argument must then carry into this absurdity, that there is no *jus crediti* whatever created by a clause of conquest, even in favour of the whole children of the marriage; for the extent of the conquest, with regard to all of them *in common*, is as uncertain, precarious, and defeasible by the after onerous deeds of the father, as is the share of any one particular child.

THE respondents proposition is, that every child of a marriage, where there is a clause of conquest, is a creditor to the father in a *reasonable proportion* of the conquest, according to the number of the children existing at the time.—If there are two, each is a creditor in a half; if there are three, each is creditor in a third; and if the number increases to four or more, the *jus crediti* of each particular child diminishes in proportion.

It is extremely true, that sometimes by express stipulation, and at all times by the operation of the law, the father has a discretionary power of division, which enables him to increase or diminish the share of any particular child; but this is not, in the last degree, inconsistent with each particular child being a creditor

creditor to a certain share, so long as the father either neglects, or does not chuse to exercise his power of division. The *jus crediti* of each particular child, is no doubt, by pactio. or by law, subjected to the controul of the father; but this notwithstanding, the children are each of them *legally* creditors to a *share*, in proportion to the number of children existing at the time.

IT is from this power of division or controul, which the law has vested in the father, that our lawyers have been led to lay down the proposition, that the *familia* in general, and not the particular children, are creditors in a clause of conquest. This is extremely apparent from the words of Mr. *Erskine*, quoted in the petition: "No provision, says he, granted to bairns. gives a special right of credit to any one child as long as the father lives, P. 15.
 " the right is granted *familie*, so that the whole must indeed go
 " to one or other of them; but the father has a power inherent in
 " him to divide it among them, in such proportions as he thinks best;
 " yet so as none of them may be entirely excluded.

FROM this passage, it is plain that the author means only to deny a special right of credit to particular children, because the father has a power of division; but, with submission, the mode of expression is inaccurate; for although the father, by his inherent power of division, may, if he pleases, increase or diminish the right of particular children; yet that does not prevent each child, so long as a power of division is not exercised, being a creditor for his own share, in proportion to the number of children existing at each particular period.

AND, to illustrate this, let the case be put, that by the contract of marriage, the friends of the children *nascituri*, suspicious of the judgment or discretion of the father, shall expressly stipulate that the father shall not have the power of division, but that the children shall have the conquest by equal proportions, the respondent would beg leave to ask, whether there is the shadow of doubt in the case now put, that each child, from the moment of its existence, would be creditor for his own share? It is extremely true, that the amount of that share would not be ascertained before the dissolution of the marriage, because subject to the onerous contractions of the father; but, as has been already observed, this in no degree im-

C

pugns

pugns the proposition, of the child being creditor for a *share*, though not for a *precise sum* of conquest.

P. 17. It is further illustration of the principles now maintained, the respondent may adopt the cases put by the petitioner, of an indifferent person's establishing a provision in favours of the children of a marriage, without reserving a power of division, or of a father granting a bond of provision to the whole children of a marriage by name, without reserving to himself any power of division; in both which cases, the petitioner lays it down as certain law, that each of the children are creditors in an equal share.

THIS shows, that a provision being taken to children, or to a family *in cumulo*, does not prevent each of them from being creditors in a precise share, according to the number in existence; so that the language of our lawyers, when they say, that not the particular children, but the *familia* in general, are creditors under a clause of conquest, is no more but an inaccurate mode of expressing the principle in law, that the father, in such clauses, is intrusted with a discretionary power of dividing the sum of the conquest amongst the children.

UPON the principles, therefore, which the respondent has already submitted to the consideration of your Lordships, they do humbly beg leave to draw this conclusion, in support of the fundamental proposition of your Lordships interlocutor, That in the year 1748, when the marriage contract was executed betwixt *Marjory* and her husband, her share of the conquest was the half thereof, because there were but two children of the marriage in existence, and the father, nor none else intitled to do so, had exercised any power of division with regard to that conquest.

It being therefore established, that a half was *Marjory's* share of the conquest, it is impossible to doubt of that half being discharged, provided it was the mutual intention of both father and daughter, the one to give, and the other to take a discharge; that such was the intendment, can with no solidity of reason or argument be called in question. The words of Mrs. *Marjory's* contract of marriage, are *per se* full and irrefragable evidence of the fact. *Southam* thereby became bound to pay to Sir *Patrick Dunbar* the

the sum of 10,000 merks, in name of tocher with his said daughter, and as her share of the conquest. It is impossible to dispute, that by these words was meant her share of the conquest, provided by her mother's contract of marriage, there was no other conquest to which *Marjory* had the least claim or pretension, and Sir *Patrick Dunbar* her uncle, to whom this very sum was payable, was her mother's brother, and possessed of her duplicate of the contract. There cannot be the smallest doubt, that both parties meant and understood, that this sum was given and received in full satisfaction of all claim of conquest, that was or might be competent to *Marjory* under that contract; as little can it be doubted, that *Marjory* was thereby held to discharge her father of such claim, or to renounce the same in his favour. It was not indeed thought necessary to express such discharge and renunciation, in such full terms as those sometimes made use of; but her, and her husband's acceptance of a specific sum, as her share of the conquest, did sufficiently imply her renouncing all further claim thereupon, and would have founded *Southdun* in an action against her, to have compelled her to grant the most formal discharge, renunciation, or assignation in his favour, had the same been requisite, as it was not: And *Southdun* afterwards settling the very conquest subjects, by his third marriage contract, upon the heirs male of that marriage, demonstrates, that he then considered the claim of *Marjory*, as well as of *Katharine*, to any part of those subjects, to have been then fully discharged and extinguished.

THE respondents having proceeded so far to show, that *Marjory's* share of the conquest was a half thereof, and that the mutual intention of the father and the daughter, was to give and take a discharge of that share; the question, which naturally in order suggests itself next for consideration, is, why that discharge should not operate in behalf of the father to whom it was granted, and who does most clearly appear to have intended a stipulation for his own behoof?

As this question takes its rise, in consequence of a transaction betwixt a father and a child, relative to a provision of conquest in a contract of marriage; it is undoubtedly proper for your Lordships, to have in your eye that relation in which a parent and a child stand to each other, in virtue of an obligation of conquest; and in that view the respondents may undoubtedly venture

to assume it as established law, that they stand together in the connexion of debtor and creditor. The children have a much stronger hold than merely a hope of succession; they, in whose favours such a clause of conquest is made, are, from their very existence, creditors to their father, the obligee in that clause, although its operation, or the ascertaining the amount of the provision, may be suspended till the dissolution of the marriage.

THIS *jus crediti* of the children is discernible in a variety of these effects which it produces in law. Hence it is, that in accounting under a clause of conquest, the father takes allowance for the share given to any of the children, because he is discharging himself of an obligation, *et debitor non presumitur donare*.—Hence it is, that if one of several children intitled to a share of such provision, should die, leaving issue, the share of such child would not accresce to the surviving children, but as there is a *jus crediti* in the father, it would undoubtedly transmit to the lawful issue of such child.—Hence it is, that children can, *qua* creditors, insist for implement of a provision of conquest, without the aid or formality of a service.—Hence it is, that children can pursue redactions for setting aside deeds in contravention of the act 1621, an action only competent to true and proper creditors.—And hence it is, that a father, by deeds merely gratuitous, cannot evacuate or disappoint a provision of conquest made in his own marriage contract, in favour of the children of the marriage.

As therefore children are creditors, and the father, in the proper sense and language of law, is the debtor of his children, under a clause of conquest, the respondents must confess themselves at a loss to discover the principle upon which a father, like any other debtor in any other debt, may not liberate himself from the obligation to which he is subjected.

And this appears the more extraordinary, when your Lordships attend to some other propositions relative to a provision of conquest, which are admitted and uncontroversible. It is admitted, that the child's discharge must operate against herself, and yet by some strange magic in law, the petitioner would contend, that the discharge must operate not for behoof of the person to whom it was granted, but for behoof of another who was no party to the transaction.

IT is likewise admitted, that a discharge from the whole creditors in the conquest would operate a discharge from the whole obligation; and this being admitted, it appears extremely anomalous to argue, that a discharge from one of the creditors should not operate a discharge of the share of that creditor.

IT is admitted, that any of the children may assign their share either to a third party, or to the father himself; and if so, the respondents know no other case where an assignation to a debtor has a stronger effect than a discharge to a debtor; and if there is any *share* in the particular children of the marriage, so ascertained in law, as to be the subject of an *assignation*, the doctrine is at least hard of digestion, which says, that there is no such *share* as to be the subject of a *discharge*.

IN short, it would be endless to take notice of all those strange and anomalous consequences which seem to attend the petitioner's doctrine: If it be true, that the children are creditors, and the father a debtor, the respondent could with the petitioner had pointed out any other example in law, where a discharge granted by a creditor would not operate in favour of the debtor; but if the plea of the petitioners is well founded, then your Lordships are under the necessity of establishing that singular proposition, that a discharge granted by a creditor, will not liberate the debtor from his obligation to that creditor.

THE petitioners seem to be sensible of this difficulty attending their plea, and are therefore at pains to assimilate this case to some others in law condescended upon by them.

IT is said, that in the case of legitim, a discharge by one child of the family does not operate in favour of the father, but accretes to the other children existing and unforisfamiliarated at the time of the father's death. But this example, though formerly mentioned and much insisted upon, was disregarded by your Lordships. There is, indeed, no similarity betwixt the provision of legitim and the claim of conquest: The claim of legitim due to children upon the death of their father, is not considered in the eye of law as a debt due by the father; it is considered as a provision of law, whereby a certain proportion of his moveable effects is to be distributed amongst his children, after the death of the father; it has not an existence till after his death; the father

ther is never debtor to his children in the legitim ; he can disappoint it even by his most gratuitous deeds ; so that the similitude fails in every article, when the petitioners endeavour to produce the case of the legitim as an example, where a discharge granted by a creditor to his debtor operates for behoof of any other than the debtor ; for the comparison fails in this fundamental circumstance, that there is neither a creditor nor a debtor at the time when the discharge is supposed to be granted.

THE same answer occurs to the cases put in the 23d page of the petition, namely, That of a wife accepting a life rent provision, in satisfaction of a third of moveables, and that of a younger son receiving a satisfaction in land for his claim of legitim and right of succession to his father's moveable estate ; for although, in those cases, it is true the moveable succession is increased, at the expence of the land estate, which would otherways have accrued to the heir, yet the heir is not benefited by the discharge granted to the husband in the one case, or to the father in the other ; and for this obvious reason, that the law can put no other construction upon those transactions with a wife or a child, but solely the intention of increasing the moveable estate, for the behoof of those interested therein ; but in none of the cases put, is the person taking a discharge debtor to the person who grants it ; nor is there any legal claim, from which the husband or the father, either in the one case or in the other, can be understood as meaning to procure for himself a liberation ; in which material and fundamental circumstance, therefore, are both those cases differenced from the one now before your Lordships.

THE observations already offered, will suggest a full and satisfactory answer to the decision, *Sandilands* against *Sandilands*, 27th January 1677, quoted by the petitioners ; for as that decision respects solely the import of a discharge in the case of legitim and succession, it is, upon the principles already mentioned, clearly misapplied to the present case.

BUT if the petitioner desires to argue from analogy to other cases, he ought to take a case where the father is properly debtor to his own children, and takes a discharge from one of them ; in which case, he will find, that the discharge taken in such circumstances, operates for the father, and not for the other child

or children: *Dirleton* furnishes an example of such a case, *voce Executry*.

HE puts the following case, "A daughter having accepted her tocher and provision by contract of marriage, in satisfaction of what might fall to her, either by her father or mother's decease, the contract of marriage being after her mother's decease;—*queritur*, If another sister will have the mother's part intire, without respect to her sister's interest being renounced, as said is? *Ratio dubitandi*, That the father, who is liable for his wife's third, is in effect discharged as to his other daughter's part of the same; and on the other part, the mother's part, belonging to her children, *non jure legitimo* as bairns, but as executors and representing her, if any of them decease before confirmation, or be unwilling to confirm, their renunciation will be ineffectual, as by a person not having right."

Stewart's answer is in the following words: "A daughter, in her contract of marriage, accepts of her tocher, in satisfaction of all might fall to her, either by her father or mother's decease, and the mother is already deceased;—Whether will this daughter's share of the mother's part fall to her other sisters intire, or may the father retain it?—And it appears more reasonable, that the father should be held as discharged of it; so that the sisters cannot claim it, until as it reciprocates, and may again fall within his executry."

HERE is an example of a case, where a father is debtor to two of his children conjunctly; and in that case, it is hinted by one lawyer, and expressly spoke out by another, that a discharge taken by a father in such circumstances, operates for his own behoof, and not for behoof of his children. In short, the rule of law in this, and in every other case, so far as known to the respondents, is general, That a discharge taken by a debtor, operates for behoof of the debtor, and not of any other person whatever: And upon the application of this principle to the present argument, the respondents do conclude, that *Marjory* being creditor to her father in the obligation of conquest, and the father having taken a discharge from her for her share of the conquest, which, as there were only two children existing at the time

time of the marriage, does eventually prove to be the half of the conquest of the marriage.

THE great and capital argument throughout the whole of the petition, and which has indeed been chiefly insisted upon, is an alarm which is endeavoured to be excited in the minds of your Lordships, that the argument of the respondents does lead into consequences destructive of the security of marriage settlements; whereas the law is jealous of the power of a father; and examples are condescended upon, where the law has interposed from such a jealousy as is here supposed.

THE first of the cases put, is that where a father takes a consent or obligation from his apparent heir not to quarrel or impugn deeds which he might execute upon death-bed; and it is said, that because the law entertains a jealousy of the father, it will not give strength to any such transaction; but, notwithstanding thereof, the son is allowed to reduce deeds done to his prejudice upon death-bed.

BUT the petitioners are under a mistake, when they suppose, that it was a jealousy of the father which chiefly actuated the law in giving such strong security to the law of deathbed. The law of deathbed is a salutary provision in the law of this country; and the petitioners view it in a point by much too narrow, when they suppose it only intended for the security of apparent heirs: It had a more generous, humane, and liberal object in view; it was introduced for a protection to dying persons, to guard them against the artifices of cunning men, to procure to them peace and quiet in the last and serious moments of life. The law therefore considers every transaction or private agreement to be *contra bonos mores*, which tends to defeat so pious and salutary intentions: And upon this ground, as much as that mentioned in the petition, it is, that the law refuses effect to every paction or agreement which tends to deprive a dying person of that peace and security which the humanity of the law has provided for him.

ANOTHER case put, is that, where, by any private latent deed betwixt a husband and a wife, the sums stipulated in a marriage contract is restricted; in which case, it is said, the law will not support

support such a transaction, because *contra fidem tabularum nuptialium*.

The respondents do not controvert the law as laid down by the petitioner; but they do deny that a jealousy of the power of the father does in the smallest degree enter into the consideration of this part of our law: It is different motives and principles which actuate here; for if the provisions are restricted, which have been stipulated in favour either of the husband or wife, the law denies effect to the restriction, *ne mutuo amore se invicem spo-lient*. And again, as to the provisions in favour of the children of the marriage, besides the reason already mentioned, there occurs this other and satisfactory one, namely, that by the stipulation in the marriage contract, there is a *jus quæsitum* to the children *nascituri*; and therefore, the right of the children cannot be cut off by the deed of the parents, without their own consent and approbation.

As, therefore, the cases put by the petitioners do not evidence any jealousy being entertained by the law against the power of the father; so the respondents beg leave to say, that the very case now in hand, namely, that of a provision in a contract of marriage, affords the clearest demonstration, that the law entertains no such jealousy of the power of a father with regard to his own children. Does not the law allow to him a distributive power to the most arbitrary extent? And can there be a stronger evidence of the confidence which the law reposes in a father, relative to the concerns of his own children? Nor is it a supposition to be made; it is not the genius of the law to make it, that a father will sit down with any such deliberate plan to defraud his own children, as is suggested in the petition.

It is said, that the question is not what fathers will do, but what a father may do: To which the respondents beg leave to answer, that it would be a most extraordinary proposition to lay down, that all fathers shall be absolutely debarred from transacting with their own children, because parents, monstrous enough, may arise to plan a scheme for defrauding their children.

THE respondents must further observe, that the very quotation from *Dirlston*, given by the petitioner herself, shows, that it is not the genius of the law, to be alarmed with such imaginary jealousies and apprehensions, with regard to a father, as the petitioners would now attempt to excite in the minds of your Lordships; *Dirlston* is at great pains to point out the danger of intrusting a father with a discretionary power of distribution, as to the provisions of a marriage contract in favour of children; and he even condescends upon that very scheme of fraud which the petitioners make so great a handle of for their present purpose: He says, "If that power were allowed to a father, it may be abused; and, intending to marry again, he might deal with one of his children, and give him more than his portion; he may, by transaction, settle all the conquest on him in prejudice of the other children."

BUT although all this was pointed out to your Lordships predecessors, by the doubts of so great an oracle of law; yet it had no weight with them, when put in competition with that rational and just confidence which is due to the actions and deeds of a father; but as often as that power of division has been called in question, so often has it been confirmed and established by the judgments of this court; and before any other lawyer, after *Dirlston*, should attempt to excite the same jealousies and apprehensions which gave rise to the doubts of that great lawyer, he should be able to point out some one or other fatal consequence which has ensued from the judgments of your Lordships, giving force and authority to the will and power of a father, in disregard of those difficulties which were so early suggested in support of a contrary mode of decision.

BUT what, with submission, sets all the petitioner's vain clamour in an absurd point of view, is this simple consideration, that *five six, five seven*, whether the law is, or is not jealous of the power of a father, it is clear as the sun at noon-day, that the applying the principles of the petitioner's argument could not have another earthly effect, but to cut down this rational transaction in question, and would not give one additional security to children provided by a marriage contract, if a father should be inclined to follow forth such a scheme of fraud and machination

machination against his own children, as is so ingeniously drest up in the petition.

THUS appears in so clear a point of view, the respondents confess themselves surpris'd that the petitioner should have insisted so much upon this topic: Is it not admitted, that the father has an unlimited power of division? and such being the case, the respondent would ask, what is there to prevent a father, intending to defraud his children, to follow furth the plan suggested by *Dirleton*? may he not deal with one child so as to acquire a right to her share? and when that right is acquired, what prevents him from exercising his power of division in such a manner, as to allocate the greatest part of the conquest to that very child in whose right he has placed himself?

AGAIN, is it not an undisputed point, that a father may take an assignation from his own child to her share of the conquest, and in virtue of that assignation, will be intitled to draw her full share of the provision of conquest? It is clear then, that such an assignation has to all intents and purposes the same effect as the discharge in question. Now, the respondents desire again to ask the question, where is the security of the children against a father intending to defraud? what coercive power, what mean of concussion, what scheme of fraud can a father devise to procure a discharge, which will not be equally available to procure an assignation?

THE respondents have put this question at every one stage of this cause; but to this hour an answer has never been attempted, and yet they will be bold to say, that unless an answer, and a satisfactory one too, is made to those questions, it is *vox, et præterea nihil*, to rove at large upon the security of marriage settlements; for it is impossible to point out any one respect in which that security can be endangered by such a transaction as the present, which does not equally arise from all those other transactions which are confessedly within the power of a father.

So standing the case, the respondents would be glad to know, what mighty acquisition the security of marriage settlements is to acquire from the ingenious argument of the petition: The respondents cannot discover a single one, unless it can be argued, that the overthrow of this single transaction is to have so wonderful

an effect ; for it is clear, that the overthrow of it alone would be the consequence : For if ever a father, on any future occasion, shall incline to enter into a transaction with his own children, which shall be removed beyond every possibility of challenge, he has only to follow some of those methods which have been suggested, and then he may rest in perfect security.

AND this leads to observe, that *Southdun* would indeed be unfortunate if such was to be the case ; he entered into no latent and clandestine transactions with his children, every thing he did was with the intervention, and at the sight of their best friends, and he could little dream that any transactions of his with his children, would be the foundation of an argument to diminish the rational powers of a parent. The transaction in question was as fair as any could possibly be ; and although the petitioner, for her present purpose, finds it convenient to exaggerate the conquest of the second marriage in a remarkable degree, yet she herself knows how vain and groundless such representations are.

YOUR Lordships will recollect, that by the clause in the contract of marriage, " nothing should be habite and repute conquest, but what *Southdun* should be worth at the dissolution of " the marriage beyond his then land estate, after payment of all " his just and lawful debts already contracted, or to be contracted by him during the marriage." The summons at the petitioner's own instance, claims relief of sundry debts due by *Southdun* at his death, amounting altogether with interest to about 7000 *l. Sterling* ; whereas the value of the subjects claimed as falling under conquest, is only as follows.

	£.	s.	d.
1. A wadset right on the lands of <i>Latheronrubell</i> , redeemable for — — —	1111	2	2 ⁸ ₂
2. A wadset right over the lands of <i>Gannishy</i> , re- deemable for — — —	370	11	8
3. Some old houses in <i>Thurso</i> , purchased for —	222	4	5
4. The lands of <i>Northdun</i> purchased in <i>Novem-</i> <i>ber 1750</i> ,—four years before the dissolution of the second marriage, for which <i>Southdun</i> paid	3777	15	6 ⁸ ₂
	<hr/>		
	5481	13	10 ⁴ ₂

So that these subjects, with *Southdun's* executry, moveable estate, and every other fund or subject belonging to him at his death in 1760, will hardly be sufficient to pay those debts in the petitioner's summons of relief, much less to pay those debts, and 1444 *l.* 8 *s.* 10 $\frac{8}{12}$ *d.* contained in the bonds of provision to the children of the second marriage.

THE petitioner ought therefore to be moderate in her expectations with regard to the conquest in question: But if she alleges that the respondents are mistaken in their ideas of the matter, she has surely the less reason to complain, as by your Lordships judgment, and the repudiation of her father's bond, she is entitled to the one half of that conquest; so that it is inconceivable, upon what footing, either a plea of favour, or a plea of wrong can be set up by her, as she receives every farthing which in law, reason or justice, she ever was or could be entitled to.

THE respondent cannot leave this argument without taking notice of the danger of being moved by declamatory topics, to debar fathers the power of transacting with their own children: Much favour is, no doubt, due to contracts of marriage; but much regard is likewise due to the transactions of a father; such transactions are for the benefit both of parents and of children. A stronger example cannot be produced, than what arises from the very clause of conquest, which is the foundation of the present question, not to mention the embarrassment which attends the execution of every such clause. The present clause of conquest was peculiar, in this respect, that the subjects of conquest were burdened, not only with the debts of the marriage, but likewise with prior contractions; so that, in such circumstances, no person in his senses can doubt of the rationality of a child accepting a fixed and certain portion, in place of so precarious and uncertain a provision. The good will and affection of the father is not excluded by such a transaction, provided after circumstances make it rational for the father to give an addition; and accordingly, by the bond in the 1757, *Southdun* made a provision of no less than 8000 merks, notwithstanding the discharge he had formerly got, upon the payment of the 10,000 merks at the time of her marriage.

THE petitioner next proceeds, and is at considerable pains to show, that the power of division now established in the father

relative to a provision of conquest, was not always understood to be law; and one or two cases are quoted in support of this proposition.

BUT the respondent is at a loss to discover what aid the petitioner's argument would draw from this circumstance, although the law was understood formerly to have been as is alledged by her; the respondent must on the contrary think, it would tend to weaken her argument: For the petitioner herself has founded a good deal upon this power of division, in order to shew, that the children are not creditors to their father in any *share* of the conquest, and of course cannot discharge a precise share; so that all this argument would of necessity fall to the ground, if it could be established, that he had not the power of division.

IT is, however, pretty obvious, that this account of the law, as supposed to stand in former times, is given in the view of rearing up the speciality by which the petitioner afterwards endeavours to difference the case of *Allardyce* from the one now under your Lordships consideration. For this reason, and this only, the respondents cannot allow the petitioner's deduction to pass unnoticed, and they do humbly maintain, that except in the doubt of *Dirleton*, as recited in the petition, there is no ground to believe, that the father's power of division was ever called in question, nor do the cases quoted by the petitioner, tend to establish any such position.

P. 10. THE first of these is *Stewart contra Stewart*, 29th January 1678. This case is collected by *Stair*; and, from examining it, your Lordships will discover, that there is not the smallest ground to believe, that the father's power of division was doubted of, or called in question. Indeed, it does not occur, how, in that question, this article of our law could at all enter into consideration: The clause of conquest in the marriage contract was, *to the heirs or heirs of the marriage, one or more*; and the father having taken the sum of 20,000 merks, which, so far as appears, was the whole of the conquest, to himself, and his only son and heir, in prejudice of the rest of the children; the question occurred much similar to one which was afterwards litigate in the case of *Allardyce*, whether the destination of conquest in these words, was, or was not a provision for the behoof of the whole issue of the

the marriage; and your Lordships predecessors gave the same judgment which was afterwards repeated in the case of *Allardyce*, that such a destination was a provision not for the heir, but for the issue and bairns of the marriage; but there was no question as to the father's power of division; and so far as can be gathered from the case as collected, the father gave the whole conquest to the son, without making any division at all.

THE other case quoted, is that of *Elizabeth Grant contra Patrick Grant of Dunlugas*, 9th July 1712, which the petitioner is pleased to consider as more directly in point.

THIS case is collected by *Forbes*, and therefore not so accurately as is usual with other collectors. The respondents, indeed, are at a loss to understand the circumstances of the fact. It appears, that not only *Elizabeth*, but likewise her brother *Andrew Grant*, were creditors in the 6000 merks provided to the younger children; but it is stated, that *Elizabeth* alone appeared as pursuer, without mentioning any thing relative to *Andrew* the co-creditor in the debt. But, if the respondents mistake it not, the fact was, that neither *Andrew* nor *Elizabeth* had granted any discharge of the provision; and that although 6000 merks had been provided, only 1000 was recovered, the assignation to the debt of 5000 merks, in implement of the rest of the provision, having proved ineffectual. The question occurred, whether, notwithstanding of this failure as to the 5000 merks which had been assigned, the father was not yet obliged to make good the whole provision: The judgment was in favour of the daughter, because, "That though the father, by his power of division, might give more or less of the 6000 merks to her brother and her, he was still obliged to give the whole between them; if the father had made no division, the son and daughter would have had right to the 6000 merks, equally and by just proportions; which *jus quesitum* could never be taken from them but with their own consent, except upon payment of the whole 6000 merks to one or other, or both."

THE respondents have no occasion to dispute any part of this *ratio decidendi*: It is not alledged that the father had given 5000 merks to *Andrew*, and that, notwithstanding thereof, *Elizabeth* was still allowed to claim more than the remaining 1000 merks; but the

the question was, whether the father being bound in a provision of 6000 merks, he could fulfil that obligation, by making good 1000, and giving a void and an ineffectual assignation as to the remaining 5000. The court rightly judged he could not, because there was a *jus quesitum* in the children, which could not be defeated, except by their own consent, or upon payment of the whole 6000 to one, or other of the children.

BUT although this decision does not in any one article aid the plea of the petitioner, the *ratio decidendi* therein express, establishes more than one material proposition in favour of the respondent's plea. In the *first* place, It establishes, that notwithstanding there being such a power of division inherent in the father, still there is a *jus quesitum* to each of two children for their share of the conquest, equally, and by just proportions.—And, *2dly*, It establishes, That this *jus quesitum* can be taken away, not only by payment of the whole provision to one or both, but likewise by their own consent; and surely such consent cannot be more explicitly declared, than by a discharge granted to the father, which is precisely the case now under the consideration of your Lordships.

THE respondents do therefore say, that the petitioner has alleged nothing, to suggest to your Lordships an idea, that the father's power of division was ever doubted or called in question; on the contrary, it appears to have been taken for granted, particularly, in the case of *Allardyce* hereafter to be mentioned; and the petitioner herself admits, that in the case of *Douglas*, 10th July 1724, when it was first disputed, and in every subsequent case, it has been uniformly sustained and affirmed; so that the respondents cannot discover, upon what authority the petitioner has said, that this power of division was, at any period, understood not to be vested in the father, when it appears to have been solemnly affirmed, the first time it was ever disputed in a court of justice.

THE petitioner concludes with endeavouring to impugn or disprove the judgment given by your Lordships, and the house of Lords, in the 1720 and 1721, in the question betwixt the son and widow of *John Allardyce*, from that case which is now under your consideration.

THE particulars of that judgment will probably be remembered by your Lordships; but, to save the trouble of recurring to former papers, they shall be here very shortly resumed.

JOHN ALLARDYCE merchant in *Aberdeen*, by his marriage contract in 1683, with *Agnes Mercer* his first wife, besides the sum of 6000 merks to be secured to the heirs of the marriage, came under this mutual obligation, "That whatsoever lands, " heritages, debts, sums of money, and others it shall happen " either of the said parties to conquests, acquire, or succeed to, " during the time of the said marriage, the heirs of the marriage " shall succeed thereto in *integrum*." A power was also given to the husband of dividing these provisions among his children.

THE said *Agnes Mercer*, the wife, died in 1700, leaving issue one son, *John*, and two daughters; at which time the husband's free estate was said to be about 18,000 *l. Scots*.

IN the 1703, the said *John Allardyce*, the father, entered into a second marriage with *Jean Smart*, and by marriage contract became bound to settle 15,000 merks of his own, with 7000 merks, being the wife's portion, to the children of that marriage in fee; and also to provide to them the whole lands, &c. that he should conquest or acquire during the marriage.

JOHN ALLARDYCE bestowed 10,000 merks on *John* his son of the first marriage, without obtaining any discharge from him; and to each of the two daughters of that marriage he gave 4000 merks; and they in their marriage contracts accepted thereof, in full of all they could severally claim by their mother's contract.

JOHN ALLARDYCE, the father, died in 1718, leaving his second wife a widow with nine infant children of that second marriage: To the four sons of that marriage he, by his will, devised 6000 merks each, and to the five daughters 4000 merks each, being in all 46,000 merks.

UPON this event, *John*, the son of the first marriage, brought an action in this court against the widow and children of the second marriage, as representing his father, upon this medium, that by his mother's contract, his father had provided the whole

conquest made during that first marriage to the heirs thereof. That his father's free estate, at the dissolution of the marriage, amounted to about 18,000 *l. Scots*; and that he, the pursuer, was intitled to the whole thereof as conquest, deducting only the 3000 marks paid to his two sisters, who had discharged their father.

THE defenders answered, That the father's estate, at dissolution of the first marriage, was not so considerable as alledged; but supposing it to be so, the pursuer could claim no more than a third share thereof, it being provided to the heirs of the marriage; and there being three children of that marriage, the same would by the contract be equally divided among them: That the pursuer had already received more than his third; and although the father had agreed with the two daughters, and obtained their discharge for a smaller sum than their third shares, yet the pursuer could not claim any benefit thereby.

AFTER sundry proceedings, which need not be resumed, and other points being debated that do not apply to this case, the Lords, on the 16th *February* 1720, *inter alia*, found, " That the provisions in favour of the heirs of the first marriage are to be understood in favour of the children of the marriage, of which there being three in number, and two of them having accepted of special sums from their father, in satisfaction of all they could claim, in virtue of the said contract, the pursuer was only intitled to claim a third share of these provisions."

AGAINST this interlocutor *John Allardyce*, the pursuer, reclaimed; upon which a hearing in presence was appointed; and the Lords, upon the 14th *July* 1720, " found, that the two daughters of the first marriage having accepted of provisions in their contracts of marriage, in satisfaction of all that could fall to them by their mother's contract; which provisions being less than would have fallen to them as two of three children of the first marriage, supposing that all the children of that marriage were intitled to an equal share, the superplus of the two thirds more than the provisions received did not accrue to the son of the said marriage, but was at the father's free disposal." And before answer as to the point, Whether the provision to the heirs of the marriage intitled the son to the whole

whole, or divided among the three children? the Lords appointed the chancery records to be inspected as to the retours of heirs under such provisions, of sums of money, or moveables; and upon a report from the chancery, their Lordships, on the 11th *January* 1721, found, "That the three children of the first marriage had an equal interest in the provisions contained in their mother's contract of marriage."

AGAINST these interlocutors *John Allardyce* took an appeal; and after hearing counsel for two days, the house of Lords, upon the 21st *February* 1721, dismissed the appeal, and "ordered and adjudged, that the interlocutory sentences or decrees therein complained of, be, and are hereby affirmed."

THIS judgment of your Lordships, and the last resort, appeared to be so much in point, and to contain an answer so directly *in jure* upon the point now before your Lordships, it did not occur, that the petitioner could attempt to difference the one case from the other: But she has endeavoured to point out two specialities with regard to which the respondent must trouble your Lordships with a few observations.

THE *first* is, that at the time of this judgment it was not understood to be law, that the father had a power of division, unless it was specially reserved; and that no other sense could be made of the words of the judgment, finding, that provisions in favours of the heirs of the first marriage are to be understood in favours of the children of the marriage; and it is said, that as this was understood to be law at the time, so each child was understood to have a precise right to its own share; and therefore none of the other children of the marriage could have any claim as to the share of another which was discharged.

THE respondents have already had occasion to take notice in general of that proposition which the petitioner has here assumed as the foundation of her argument; and they do further maintain, that nothing can be clearer, than that at the time when the judgment in the case of *Allardyce* was pronounced, the power of division was undoubtedly understood to be inherent in the father. Upon this position does the argument of the appellant altogether proceed; and although the application of the principle is disputed.

puted by the respondent, the principle itself is not called in question. This is obvious from the argument as stated in the case for both parties.

Obj. 1. THE plea of the respondent, and the argument of the appellant is stated in the appellant's case in the following words :
 " That by the appellant's said mother's contract of marriage, all
 " her children, as heirs of that marriage, being to succeed to the
 " acquisition, his sisters acceptance of portion as satisfaction, and
 " discharging their father, made their shares thereof return to
 " the father, so as he might dispose of the same as he pleased,
 " and that therefore the appellant was entitled to only one third
 " part of that sum.

Answer. " To which it was answered, that though, by the conception
 " of the contract, the heirs of the marriage are to succeed, which,
 " when the subject of the succession is personal, may admit of
 " the interpretation, that the provision was in favour of the chil-
 " dren; yet still the father had the power of division, and he ha-
 " ving given only 4000 merks to each of the daughters, which
 " they accepted, this was nothing else but a dividing to each of
 " them their share thereof, leaving the rest for his only son to
 " succeed to, who, properly speaking, is the only heir of the
 " the marriage, and without this the said contract could never
 " be fulfilled, whereby the succession to the acquisition was pro-
 " vided to the heirs of the marriage *in integrum*; and this ap-
 " pears to be the father's intention, since he took no assignment
 " of any pretensions his daughters might have thereto, but gave
 " them such a provision as he thought was suitable with respect
 " to the heir and the extent of his fortune."

Obj. 2. THE same argument in the respondent's case is stated in the
 following words : " That if all the children were to succeed e-
 " qually, yet the father had the power of division, and he ha-
 " ving given 4000 merks to each of his daughters, and which
 " they accepted in full of what they could claim by their mo-
 " ther's contract of marriage, that could only be construed to be
 " an appointment to each of them of a particular share of the
 " conquest, leaving the residue to the appellant, who properly is
 " the only heir of the marriage; for otherwise the clause in the
 " marriage articles could not be pursued, since the conquest
 " would

“ would not descend to the children of the marriage, and this
 “ seems to have been the father’s intention, since he only took
 “ releases from his daughter, but no assignment to their propor-
 “ tions.”

“ That the father being the person bound to apply the con-
 “ quest to the children of that marriage, he might discharge that
 “ obligation the best way he could do, to the satisfaction of the
 “ parties, and as he was the debtor, whatever advantage is ob-
 “ tained by any transaction, must be to the use of the father, for
 “ he must be presumed rather to discharge himself, than acquire
 “ any right to another. The two sisters were then entitled each
 “ of them to a third share, the father agrees with them for a less
 “ sum. That must and can only be to the benefit of the father,
 “ who was their debtor; and the rather, since he had been at the
 “ expence of their education and marriage after his second mar-
 “ riage, which so far diminished the conquest during the second
 “ marriage; and to which the respondent had a right; nor
 “ could there be any occasion for an assignment to the daughters
 “ shares, for the father being debtor, the release extinguished the
 “ debt, and the father was so far from intending any benefit to
 “ the appellant by these transactions, that he expressly declares the
 “ sum of 10,000 merks, and fee of the house given to him, should
 “ be in full of all he could claim by his mother’s contract of
 “ marriage, or any other way whatever.”

So stand the reasonings of the parties in the case of *Allardyce*; and your Lordships will observe, that both of them concur in stating their own and their adversary’s plea in the same point of view; and although the argument of the appellant is founded solely upon the power of division vested in the father, yet it is never so much as called in question by the respondent, although, if she had been able to overturn that proposition, it was at once destroying from the foundation the whole ground work of the appellant’s plea.

As to the finding in the interlocutor, that the provisions in favours of the heirs of the marriage, are to be understood in favours of the children of the marriage; it neither was intended, nor does it in the least impugn the principle of the father’s inherent power of division; that finding in the interlocutor was directed to quite another purpose, namely, that of a claim set up by the

eldest son of the first marriage, that he, as heir, and not the children in general, was intitled to the provision in the contract of marriage.

THE other speciality is, that at the time of the transaction with the younger children, in the case of *Allardyce*, the mother was dead, so that the children were *de jure* intitled to their share of the conquest; and therefore not unreasonable to suppose, that the discharge should operate for behoof of the father.

THIS speciality, although a difference in the circumstance of the fact, is altogether immaterial as to the argument in law; at the same time it contains an admission destructive of a great part of the argument maintained by Mrs. *Katharine* in the first part of her petition: It is there argued, that no particular child could with any propriety be said to have a right to a share of the conquest, because subject to the contractions of the father, and to be divided as he should think proper. But the respondent would ask, is the father's power of division less after, than before the dissolution of the marriage? it certainly is not: So that the petitioner's own attempt to difference the case of *Allardyce*, upon this speciality, clearly supposes, that notwithstanding the power of division inherent in the father, each of the children are *de jure* intitled to a share, and that share must increase or diminish in proportion with the number of the children in existence, so long as a power of division is not exercised.

It is therefore altogether immaterial, whether the transactions betwixt fathers and children relative to the conquest, are prior or posterior to the dissolution of the marriage; that circumstance may render it more dubious, what may be the amount of the share, on account of the supervening chance of children during the subsistence of the marriage; but it can in no respect detract from the truth of the respondents proposition, That every child, from the moment of its existence, is *de jure* a creditor in a share of the conquest, and may by a discharge, like any other creditor, liberate the debtor from the obligation of conquest.

It is insinuated in the petition, that the eldest son must have got from his father *John Allardyce* the 10,000 merks, and house in *Allden*, in full of all he could claim; and that it is so averred in

in the case. But it is clear, that this averment must either have been made at random, without any authority at all, or in consequence of some vague expressions thrown out by the father either verbally, or in some writing or deed where the son was no party; for, if the son had granted a discharge of his claim of conquest, it is simply impossible, that there could have been any room for the question, or for the arguments which were respectively maintained by both parties.

THE petitioner closes her observations upon the case of *Allardyce*, with saying, that it is but a single judgment, which ought not to prevail over so many authorities, precedents, and principles, and where the establishing such a proposition might be attended with consequences so pernicious to every marriage settlement, wherein provision is made for the issue of the marriage.

THIS is the last effort of every litigant who finds himself in desperate circumstances, overwhelmed with the authority of former judgments. Your Lordships are not fond, in any case, of running counter to the judgments of the house of Lords; for as it is the genius of the supreme court to be uniform in their decisions, you are never inclined to put any party to the unnecessary expence of seeking redress by repeated appeals upon the same point. But the respondents have no occasion to shelter themselves behind such a shield, as they are hopeful to have fully satisfied your Lordships, that the petitioners have neither produced authorities, precedents, nor principles, in opposition to your interlocutor; and that all the consequences pernicious to marriage settlements, supposed to flow from adhering to that interlocutor, are altogether imaginary and affected.

In respect whereof, &c.

HENRY DUNDAS.

The Lords adhere

(120. 3. 3. 3. 3.)

AUGUST 4, 1768.

Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N
O F

Henrietta, Janet, Emilia, and Margaret Sinclairs, only Children alive of James Sinclair of Harpsdale, Esq; by the deceased Mrs. Marjory Sinclair, his Wife, and of the said James Sinclair of Harpsdale, their Father and Administrator-in-law,

Humbly sheweth,

THAT the deceased *David Sinclair* of *Southdun* entered into three different Marriages, and left Issue by all his Wives.

In 1714, he married Lady *Janet Sinclair*, by whom, besides other Children, he had a Daughter, *Janet*, that, in 1753, married *Stewart Threipland* of *Fingask*, Esq; and died in 1755, leaving Issue, a Son, *David Threipland*, and a Daughter, *Janet*.

Lady *Janet Sinclair* dying in 1720, *Southdun*, in 1722, married Mrs. *Marjory Dunbar*, and, by Contract, solemnly concluded before the Marriage, "The said *David Sinclair* binds and obliges him and his forefairs, to provide, secure, and make Payment, to the Children of the Marriage, the Sum of 10,000 Merks, to be divided and distributed among them by their Father, with Consent of their Mother, during their Lifetime; and, failing such Distribution or Division, by two of the nearest of Kin on the Father's Side, and two of the Mother's Side;—And whatever Lands, Heritages, March 12,
1722.

A

" Sums

“ Sums of Money, or *others whatsoever*, it shall happen the said
 “ *David Sinclair to conquest or acquire* during the Marriage, he
 “ binds and obliges him to provide and secure the same in Man-
 “ ner following, *viz.* the one Half to the said Mrs. *Marjory Dun-*
 “ *bar* in Liferent, for her Liferent Use allenarly, during all the
 “ Days of her Lifetime, (and that by and attour her Liferent pro-
 “ vision above written) and the *whole* to the Children of the Mar-
 “ riage in Fee, to be *divided among them* in Manner above men-
 “ tioned, declaring, that nothing shall be repute Conquest, but
 “ *what he shall be worth at the Dissolution of the Marriage beyond*
 “ *his present Land Estate, and after Payment of all his just and law-*
 “ *ful Debts, already contracted, or to be contracted, by him, during*
 “ *the Marriage.*”

Of this Marriage issued two Daughters, *Marjory*, the eldest de-
 ceased, and *Katharine*, the youngest.

And, during its Subsistence, *Southdun*, acquired a Variety of
 Subjects, *viz.* 1^{mo}, From Sir *Patrick Dunbar* of *Northfield*, an he-
 ritable Bond and Wadset-right, in 1745, over a Part of the Lands
 of *Latheronwheel*, for 20,000 Merks Scots. 2^{do}, A Tack of the
 whole Lands of *Latheronwheel* from Sir *William Dunbar* of *Hemp-*
rigs, the Reverser, for Payment of a Surplus Tack-duty of 1000
 Merks Scots yearly; and this Tack *Southdun* got renewed in 1754,
 for a Term of thirteen Years from the *Whitsunday* of that Year.
 3th, The Property of some Houses in the Town of *Thurso*. 4th,
 A Wadset-right over the Lands of *West Canisly*, redeemable for
 4447 l. Scots. And, 5th, the Lands and Estate of *Dun*, purchased
 in 1751, from *Alexander Sinclair* of *Dun*.

Marjory, the eldest Daughter of *Southdun*'s second Marriage, was
 first married in 1748, to *John*, Son of the said Sir *Patrick Dun-*
bar, and by Marriage-articles concluded on that Occasion, “ be-
 “ twixt the Parties following, *viz.* *John Dunbar*, only lawful Son
 “ now in Life, procreate betwixt Sir *Patrick Dunbar* of *Northfield*,
 “ Baronet, and Dame *Katharine Brodie*, his pretent Spouse, with
 “ the special Advice and Consent of the said Sir *Patrick Dunbar*,
 “ his Father, *on the one Part*, and Mrs. *Marjory Sinclair*, eldest law-
 “ ful Daughter, procreate betwixt *David Sinclair* of *Southdun* and
 “ Mrs. *Marjory Dunbar*, his present Spouse, with *the special Ad-*
 “ *vice and Consent* of the said *David Sinclair*, her Father, *on the*
 “ *other Part*,—the said *David Sinclair* of *Southdun* binds and ob-
 “ liges him, and his Heirs and Executors, to content and pay, in
 “ name

“ *name of Tocher with his said Daughter, and as her Share of the*
 “ *Conquest*, to the said Sir Patrick Dunbar, his Heirs or Assignees,
 “ including Executors, the Sum of 10,000 Merks Scots, at the
 “ Terms therein mentioned.”

This Contract does not contain any Clause, by which *Marjory* either renounced her Right to her Legitim, or discharged her Father of the Claims competent to her in consequence of the Marriage-articles 1722, or signified even her Acceptance of the Portion of 10,000 Merks then given with her; much less were the 10,000 Merks declared to be in satisfaction of all she could demand through his Death, and she did not discharge, or assign *Southdun* to any, or every thing she could ask or crave under that Contract, but all which appears is, that the ten Words above recited, were thrown into the Deed, without referring to *Southdun's* own Marriage-articles, or explaining what was therein intended, by the Words, *in name of Tocher, and as her Share of the Conquest*, of which the Meaning and Effect are left to be determined by Conjecture.

Southdun's Marriage with Mrs. *Marjory Dunbar* dissolved by her Death in 1755, and in 1757, he executed a Bond of Provision for the Sum of 8000 Merks, payable at the first Term of *Whitsunday* or *Martinmas* after his Death, in favour of his Daughter *Marjory*, the Petitioner's Mother, and *James Sinclair* of *Harpisdale*, their Father (whom she married after Mr. *Dunbar's* Death) in Conjunction and Liferent, and to the Child or Children, male or female, procreate, or to be procreate between them, in Fee, divisible in the Proportions therein mentioned. This Bond proceeds on the Narrative, that the Provisions made for the Children, procreated, or to be procreated between her and *Harpisdale*, were too mean; and that therefore, he thought proper to add the Sum of 8000 Merks to them; and it further contains a very ample Clause, declaring that said Sum of 8000 Merks, and the Sum of 10,000 Merks, formerly paid by *Southdun* to his said Daughter, in name of Tocher, and for her Share of the Conquest, are granted by him, and accepted by her and her said Husband, in full Satisfaction to her of her Share of the Provisions granted by him in the Contract of Marriage, betwixt her deceased Mother and him, in favour of the Daughters of the Marriage, failing Heirs-male, and in full Satisfaction to her of the Provision of Conquest of Lands and Heritages whatsoever, which should be acquired by him during the Marriage,

riage, granted by him in favour of the said Daughters, failing Heirs-male, and in full Satisfaction to her of her Portion-natural, Bairns Part of Gear, Share of Moveables, Legitim, or other Pretensions whatsoever, which she, as one of the only Daughters or Children of said Marriage, can in any ways ask, claim, or pretend Right to, by or through her said Mother's Decease, or his, the said David Sinclair's, Decease, excepting his own Good-will alenarly, and her Succession to his Estate, if the same should fall to her by Right of Blood, or any Settlement made, or to be made by him.

This Bond was found in Southdun's Repositories after his Death, and, as it was never delivered or accepted by the Parties, but was executed after the Dissolution of his second Marriage, it could not bar either Marjory herself, or the Petitioners, her Children, from claiming the Subjects covenanted to her by the Marriage-contract 1722, unless she was otherwise excluded.

Southdun himself died in 1760, leaving an only Daughter of a third Marriage, into which he had also entered, whom he provided in a Portion of 1000*l.* Sterling, and, on his Death, the Bulk of his Estate devolved to David Threipland, his Grandson, in consequence of an Entail executed in 1747; but, as Southdun knew that he stood bound to make good the full Provision aforesaid, both of 10,000 Merks, and of the Subjects conquest during his second Marriage, to the Children of that Marriage, so he took care not to include any of those Subjects in the Entail, but left them entire, to devolve, in Terms of the Obligation contracted by him, to Marjory, the Petitioner's Mother, and her Sister Katharine, who were accordingly served Heirs of Conquest and Provision in these Subjects.

But as, by the Marriage-contract, the Conquest was declared to be no more than Southdun should be worth at the Dissolution of the Marriage, after Payment of his just and lawful Debts contracted during its Subsistence, and he left a Variety of other Subjects, to be taken up by his next in Kin, Heirs of Line, Heir-male, and David Threipland, his gratuitous Heir of Provision, under the Deed 1747, who were therefore obliged to relieve the Children of the second Marriage of all Debts not chargeable on the Conquest of that Marriage, this gave Occasion to the bringing of several Processes before your Lordships.

On the one hand, a Disposition and Assignment was, of this Date, executed by Mrs. Katharine Sinclair, and the Petitioner,

James

James Sinclair of Harpsdale, in the Character of Administrator-in-law to the deceased *George-Marjory Sinclair*, his only Son by said *Marjory Sinclair*, then also deceased, by which they disposed and made over to him in *Trust*, for their own Use and Behoof, all Right and Interest they had in consequence of the Marriage-contract abovementioned, particularly to the Provision of 10,000 Merks, as well as the Subjects conquest during the second Marriage, and upon that Title Mr. *Sinclair of Durin* brought an Action, at his Instance, against the Petitioners, as well as *David Threipland*, *George-Marjory*, *Katharine*, and *Margaret Sinclair*, with their Tutors and Curators, and all others having Interest. The Libel narrates the Marriage-contract 1722, with the Debts resting by *Southdun* at his Death, and concludes, that it should be found and declared, that the Subjects, conquest during the second Marriage, are not liable for any of the Debts before specified, and that the Defenders, for their respective Rights and Interests, should be decerned and ordained to relieve the Pursuer, and the conquest Subjects, to which he has Right in manner foresaid, of the several Debts abovementioned, as also to make Payment to the Pursuer of the foresaid principal Sum of 10,000 Merks.

On the other hand, *David Threipland*, the Heir of *Southdun's* first Marriage, not contented with the opulent Succession to which he had been preferred before the Petitioners, who were equally Heirs-portioners as much as he, brought a Process of Reduction and Declarator against the Petitioners, as well as *Katharine*, *Margaret*, and *George-Marjory Sinclair*, deceased, concluding for *Reduction* of the Service that had been expedite by Mrs. *Marjory* and *Katharine Sinclairs*; and for having it found and declared, that the Provision of Conquest was effectually and totally discharged, in consequence of the several Deeds therein and above mentioned, and that, in all Events, the Heir succeeding in the conquest Subjects, and *Southdun's* other Heirs, should be found liable to relieve the Pursuer of all Debts resting by *Southdun* at his Death.

In this last Action, little Procedure was held. The Title, on which *David Threipland* pursued the Reduction, was that of one of the Heirs-portioners of *Southdun*, and as none of *Southdun's* other Heirs would concur with him, but he was the single Person who thought of challenging the Right of the Defenders, they objected to his Title to insist in the Action, because he was not served and retoured Heir of Line to his Grandfather; but the Lord Ordinary,

2^d Nov.
1799.

of this Date, repelled the Objection, by the following Interlocutor: " Having considered what is above set forth, sustains the Pursuer's Title to insist in this Action, as to *One-third* of the Subjects in dispute; and in respect the Defenders declined to take a Day, grants Certification against them for not satisfying the Production, or the Writs called for, reduces these Writs for Not-production thereof, and decerns and declares."

December 5,
1799.

Against this Interlocutor the Defenders gave in a Representation, on which the Lord Ordinary, of this Date, pronounced the following Interlocutor: " The Lord Ordinary having considered this Representation, and that the Representers admit, that the Pursuer is the only Son of Mrs. *Janet Sinclair*, Daughter to *David Sinclair* of *Southdun*, and one of the Heirs-portioners to the said *David Sinclair*, Father to one of the Representers, and Grandfather to the other Representers, and that a Service gives no Title to the Predecessor's Estate, and *is only necessary to verify the Propinquity*, refuses the Desire of the Representation, and adheres to the Interlocutor reclaimed against."

December 16,
1799.

The Cause was thereafter inrolled, and the Defenders having been repone against the Certification, great *Avissandum* was, of this Date, made by the following Interlocutor: " Of Consent of Parties, repone the Defenders against the Certification already pronounced, and remits this Process to the said former Process, depending betwixt the Parties before the Lord Ordinary; and, in respect the Writs called for are produced in said Process, *makes great Avissandum with these Writs, and with the Reasons of Reduction.*"

David Threpland did not either inrol the Process of Reduction in the Roll of ordinary Actions, to be discussed before your Lordships in Presence, or apply for a Warrant to an Ordinary to discuss the Reasons: but all the Steps, to be hereafter mentioned, were taken in the other Process pursued at the Instance of Mr. *Sinclair* of *Durin*.

February 11,
1799.

The Procedure therein held, is well known to your Lordships. Of this Date, " the Lord Ordinary, having considered the Debate, with the several Writings therein referred to, finds, that Mrs. *Margaret Katharine Sinclairs*, the Pursuer's *Cedents*, having been the only Children of the Marriage between *David Sinclair* of *Southdun* and Mrs. *Margaret Dunbar*, were intitled to full *Impliment* of the Provisions to the Children of the Marriage,

" in

“ in terms of the Marriage-articles between their Parents, viz. 10,000 Merks, and the *whole* that should be conquest during the Marriage, the Conquest being declared to be what *Southdun* should have at the Dissolution of it, over and above the Land-estate he was then possessed of, and after Payment of all Debts he was then owing, or should be owing, at the Dissolution of the Marriage : But finds, that neither of these Daughters was intitled of the aforesaid Provision, *in respect the Father, by the Conception of the Contract of Marriage, had the Power of Division*; and, therefore, finds, that, though in his Daughter *Marjory's* Contract of Marriage, he settled 10,000 Merks upon her as her Share of the Conquest, *which was effectual to cut out Marjory and her Heirs, who behoved to rest satisfied with the Division he made*, he still continued bound to make good the Provisions to the other Heir of the Marriage, Mrs. *Katharine*, so far as Mrs. *Marjory's* Share had not exhausted them; and, before Answer to the Question, how far Mrs. *Katharine* was cut out from claiming her Share of the Provisions? appoints her to make distinct and pointed Answers to the Questions put to her by the Defender, contained on a Paper apart, and to subscribe her Answers, and return them to this Process as soon as may be.”

George-Marjory Sinclair, for whom Mr. *Sinclair* of *Durin* was Trustee, had been some time dead, and the Petitioners had not appeared in that Process before the Interlocutor last recited was pronounced, because they thought it unnecessary to determine the Question concerning the Exclusion of their Mother, Mrs. *Marjory*, as their Aunt and they understood one another: Therefore they preferred a short Representation to the Lord Ordinary, praying his Lordship to alter or vary his Interlocutor in that Particular, “ at least, to supersede giving any Judgment upon the Question, how far the 10,000 Merks contracted in Mrs. *Marjory's* Marriage-articles were effectual to cut out her and her Heirs from the Benefit of the Marriage-contract that passed between *Southdun* and her Mother, till the other Question concerning Mrs. *Katharine's* Right becomes ripe for receiving a final Judgment.”

David Threipland also represented upon his Part; and both Representations, with the Answers respectively made to them, were, *March 10,*
simul et semel, advised; and though the Lord Ordinary, of this *1767.*
 Date, on the Petitioner's Representation, pronounced the following Interlocutor, “ the Lord Ordinary having again considered this Re-
 “ presentation

“ presentation, with the Answers, adheres to the former Interlocutor, and refuses the Desire of the Representation ;” yet his Lordship was likewise pleased, of *the same Date*, upon the *Answers for Sinclair* of *Durin* to *David Threipland's* Representation, to pronounce the following Interlocutor : “ The Lord Ordinary having “ resumed the Consideration of the Representation for *David Threipland* and his Administrator-in-law, with the foregoing Answers, adheres to the former Interlocutor, *so far as it finds the “ Sams advanced to Mrs. Marjory do not preclude Mrs. Katharine “ from claiming effectual Implement* of the Obligation for Conquest, “ in so far as not implemented ; and further, having considered “ the Condescendence for the Defenders, and *Mrs. Katharine Sinclair's* Answers, and, more particularly, having considered, that “ it is an agreed Fact, that *Mrs. Katharine Sinclair*, at the Time of “ the alleged Transaction, was living in Family with her Father, “ that there is no Deed under her Hand, renouncing her Claim on “ her Mother's Contract of Marriage, that it is not alleged that “ she, after her Father's Death, ever made any Claim upon this “ Bond, or even in her Father's Life, made any Claim upon it, “ finds, that she is not bound to accept of that Bond, and that “ her Claim, and the Pursuers, in her Right, to the Conquest, in “ terms of her Father and Mother's Contract of Marriage, remains “ effectual.”

To this Interlocutor, his Lordship, of this Date, adhered.

And your Lordships, on advising a Reclaiming Petition for Mr. *Threipland*, with Answers for *Mrs. Katharine Sinclair*, of this Date, pronounced the following Interlocutor : “ The Lords having advised “ this Petition, with the Answers thereto, find *Mrs. Katharine's* “ Acceptance of the Bond of Provision granted to her by *Southdun* “ not instructed, and that she is not bound to accept of said Bond, “ neither is she obliged to hold the same in Satisfaction of her “ Claim to Conquest, and in so far adhere to the Lord Ordinary's “ Interlocutors reclaimed against, and refuse the Desire of this Petition : But before Answer as to the other Point in this Petition, “ *viz.* Whether *Mrs. Marjory's* Renunciation of her Share of the “ Conquest must operate a Discharge of the one Half, and must “ restrict *Katharine's* Share to the other Half, appoint Parties to “ give in Memorials thereon *hinc inde.*”

Memorials were accordingly given in by both Parties, and Council having also been heard in Presence, your Lordships were pleased,

ed,

March 12,
1777.

June 24,
1777.
D^{ns} L^{ds} &
J^{ns}.

ed, of this Date, to pronounce the following Interlocutor: "The ^{July 26,} ^{1708.} Lords having advised the Memorials given in *hinc inde*, and having heard Parties Procurators in their own Presence, find, that the Words of Mrs. *Marjory Sinclair's* Contract of Marriage in 1748, import a Renunciation and Discharge of the Half of the Conquest provided to her by her Father's Contract of Marriage in 1722, and, consequently, must restrict her Sister *Katharine's* Share of said Conquest to the other Half; and therefore prefer the Heirs of Line of *Southdun* to that Conquest now in question, which would have fallen to the Share of *Marjory*, if she had not been excluded by her Contract of Marriage; and decern."

These Interlocutors, in so far as they import, or find, that Mrs. *Marjory* was excluded from the Conquest by the Words in her Marriage-contract 1748, and in so far as *Southdun's* Heirs of Line are preferred to her Share of that Conquest, the Petitioners must humbly submit to your Lordships. They were unwilling to engage in the Litigation, because they had full Confidence in their Aunt Mrs. *Katharine*, that she would do every thing, which in Law or Reason could be expected of her, and that, if she should be found intitled, in Competition with *David Threipland*, to take the full Surplus that remained of the Conquest, after deducting the 10,000 Merks formerly paid with their Mother at her Marriage, she would not take any rigorous Advantage, which it might be pretended accrued to her, in consequence of the supposed Exclusion of Mrs. *Marjory*, but would notwithstanding allow them to come in equal Sharers with her, agreeably to that which she knew certainly to be the Will and Intention of her Father *Southdun*.

But Matters are greatly altered by the last Interlocutor, which goes the length of finding, in express Terms, that the Words of Mrs. *Marjory's* Marriage-contract 1748, import a Renunciation or Discharge; that in consequence she was totally excluded; that the Benefit of her Exclusion does not accresce to their Aunt Mrs. *Katharine*, but goes entirely to *Southdun's* Heirs of Line, and of course that they are intitled to take or retain every Sixpence of the Conquest, which Mrs. *Marjory* herself, if she had not renounced, could have claimed.

In these Circumstances, the Petitioners must submit their Interest to your Lordships, and as it may perhaps be said that they are

concluded by the Lord Ordinary's Judgments, it will be proper, before proceeding to remove that Objection,

1st, From the Detail formerly given on that account, it appears that no Procedure has hitherto been had in the Process of *Reduction* pursued at Mr. *Threipland's* Instance. In that Action Great Avoidance was early made with the Writs produced, by which, the Cause, being totally separated from the other at the Instance of Mr. *Sinclair of Durin*, was made to depend in the Innerhouse, out of which it has not hitherto been brought.

2^d, The only Procedure, therefore, which requires to be noticed, is that which has been held in the Process at *Durin's* Instance. In that Process, *Durin* was Trustee for Mrs. *Katharine Sinclair*, and for *George-Marjory Sinclair*, only; but as *George-Marjory Sinclair* died, during the Dependence, before any Judgment was given in it, so *Durin's* Right and Title to insist became void and inefficual, at least to the Extent of the Interest originally competent to *George-Marjory*, and he was never constituted Trustee for the Petitioners.

3rd, *Durin's* Process was not an Action properly competent, or intended for settling the Question between Mrs. *Katharine* and the Petitioners concerning Mrs. *Marjory's* Exclusion, and had no Conclusion to that Effect, but implied directly the Reverse, and was only intended for settling the Question concerning the Relief of the Debts between the Heirs of *Southdam's* second Marriage, and his other Representatives.

4th, In that Process, the only Defender, for whom Appearance was made, was *David Threipland*, and the Lord Ordinary's first Interlocutor was given on a Debate between him and *Durin alone*. It is true the Petitioners preferred the Representation above mentioned; that Representation, however, did not enter into the Merits of the Question, but only set forth, that it was unnecessary to determine it, as your Lordships will see from a full Copy, hereto annexed.

This was all the Appearance which has hitherto been made for the Petitioners; and, further, the Lord Ordinary, by his Interlocutor of the 14th of *March*, above recited, appears to have purposely avoided determining the Question. It is true, he refused the Petitioners Representation, yet that Interlocutor must be explained by the other of the same Date, which is *special*, and adheres to the former, only so far as it finds the Sums advanced to

Mrs.

Mrs. *Marjory* were not sufficient to cut out Mrs. *Katharine*. Besides, his first Interlocutor was truly *hypothetical*, meaning, as it would appear, no more than that, even upon the Supposal made in the Argument for Mr. *Threipland*, viz. "that *Marjory* was totally excluded," *Katharine* was nevertheless entitled to the full Residue that remained unexhausted of the total Provision.

At any rate, the Petitioners are Minors, and, therefore, cannot be concluded, before they are fully heard, which they have not hitherto been; and your Lordships last Interlocutor, to which they were no Parties, is in every View more express than, and different from, any hitherto pronounced in the Cause.

They must therefore humbly submit a few Considerations, to show that their Mother was not excluded, but that the Petitioners, in her Right, are still entitled to draw her full and equal Share of the Conquest, on giving their Aunt an Allowance for the 10,000 Merks already paid.

These Observations shall be directed towards three Points: *first*, That *Southdun* had no Power to exclude Mrs. *Marjory*: *2dly*, That he did not intend to exclude her: And, *3dly*, That, if he had intended it, the Transaction which past on occasion of her Marriage, was not sufficient for the Purpose, but that she was not thereby barred from claiming the full Residue that remained of the total Provision, after deducting the 10,000 Merks.

Upon the *first* Point, it is perhaps true, that a Father has, even at Common Law, without the Aid of a special Article inserted for the Purpose, the Power of *dividing* Provisions made for the Children of a Marriage, in a *rational* Manner: But still that Rule admits of its Exceptions; particularly, if it is *covenanted*, that the Father shall not have the Power of Division, it is plain that Power cannot be exercised by him *cum effectu*, but the Children will nevertheless be entitled to come in equal Sharers with one another.

In like manner, every Limitation, expressly imposed on the Exercise of the Power, must also be effectual, even in those Cases in which it is actually bestowed upon him; and it can only be lawfully exercised in the *qualified* Manner settled by the Articles.

This was the present Case. The absolute Power of Division was not vested in *Southdun*, but it was expressly provided to be exercised with the Consent of his Wife; and, therefore, it was not competent for himself alone to make any Division, but
every

every Deed, by which he took upon him to divide the Conquest, was ineffectual, as well as reducible, at the Instance of the Children to whom that Act was prejudicial.

Upon this Point Mr. *Threipland* is at one with the Petitioners. In his last Reclaiming Petition (P. 21st) he not only *admits*, but *insists*, " that it was not in the Power of *Southdun*, by himself, to " have exercised such a Power of Distribution:" And the same *Admission* is again made in his Memorial, where he argues (P. 15th) in the following Manner: " *Southdun* can never be presumed to have " done, or intended, what he had clearly no Power of doing, namely, " the making, by himself, a partial Distribution of the Conquest " between his two Daughters." Again (P. 16th) he adds, " As " there was no Party with *Southdun* to *Marjory's* Contract of Marriage, it can never be supposed, that *Southdun* could, by his Transaction with *Marjory* in that Contract, mean to exercise a Power of " Division, which he must have known was utterly incompetent to " him, without the Concurrence of his Wife."

It is not pretended by Mr. *Threipland*, that *Southdun's* Wife gave her Consent to any Deed which he intended or made for that Purpose; he would not even allow, that Lady *Southdun's* being present at *Marjory's* Marriage was sufficient to infer her Consent to the Contract, or Division supposed by *Katharine* to be then made, but it was insisted by one of the Honourable Gentlemen, who spoke in the Debate for Mr. *Threipland*, that clear and express Words, ingrossed in the Deed itself, were required for the Purpose, and that her Consent could not be signified without them.

Therefore, " on Mr. *Threipland's* own Admission," that no Division was here made, the Consequence is unavoidable, that the Subjects remain *undivided* at this Day, and *in hereditate jacente*, liable to be taken up *equally* by *both* Daughters descended of the second Marriage to whom they were specially destined, and the only Question, that can properly be started, is not concerning the Subject or Share which *Marjory* or her Representatives are entitled to take, but concerning that, which *Southdun* or his Heirs whatsoever are, or would be entitled to *draw back* from them, and they were actually served and vested in the Subject.

Thus are plainly very different Questions: *Marjory* or her Representatives, may be entitled to be formally served or vested in
the

the Subjects, at the same Time that a Claim would *thereupon* arise against them, at the Instance of *Southdun's* Heirs of Line, to denude in their favour, either *in totum*, or to a lesser Extent.

In Fact, the Title, which the Children of the second Marriage had between them to the *whole* Conquest, was not disputed at *Southdun's* Death: They were duly served Heirs of Provision in special without Opposition, and were thereupon infest in those Subjects, and their Seafine is regularly recorded.

On this Supposition it was impossible for *Marjory* to be *excluded*, unless a Division was actually made; as she cannot otherwise be justly said to have got a Particle of the *particular* Subjects or Provisions destined for her, but they must be held to be still lying *in medio*, unapprehended by either Daughter: And if she has hitherto got *nothing*, she must necessarily be intitled still to demand her full Share, as it will not be pretended she could be *totally* excluded. This was a Power which *Southdun* did not possess. A Father is perhaps intitled to *divide*; he cannot, however, *disinherit* any of the Children, but must allot *something* to every one of them; it was not therefore in *Southdun's* Power, totally to exclude *Marjory*: That would have been a direct Contravention of the Marriage-contract 1722, by which it is anxiously provided, that all the Conquest should be *wholly distributed among* the Children, and as, upon the Supposal that no Distribution has been made, neither Daughter has hitherto got any Share, but both of them remain *in pari casu*, equally unassigned to any Portion, or Part of the *Subjects provided to them*, the Consequence is unavoidable, that *Marjory*, or her Representatives, must, as well as *Katharine*, be intitled to share of them, which being the Case, their Shares cannot possibly be other than *equal*, as no *Allotment* has been made, or Principle established, upon which the one can pretend, that her Condition ought to be better, or that she ought to be preferred to a *larger* Portion than her Sister.

The Right, therefore, or Title of the Petitioners, in the first Place, to take the Subjects themselves, cannot well be disputed, and as they are actually served and infest, the only proper Question is, Whether, or to what Extent, they are obliged to denude in favour of *Southdun*, or to account to his Heirs of Line?

If the Marriage-contract 1722 had not been concluded, or *Marjory* had not received the Portion of 10,000 Merks, her Claim would undoubtedly have been entire: therefore, the only Thing on which *Southan*, or his Heirs, can found, are the Words thrown into that Contract, of which the Meaning and Effect make the proper Subject of the present Question; and, to illustrate their Import, two Suppositions may be made, either that *Southan* had appeared to oppose *Marjory* in serving herself to the Subjects, as Heir of Provision under the Marriage-contract 1722, and that *Southan* had insisted her Claim was barred by the Portion and Words above mentioned: Or, 2^d, It may be supposed, that she had actually been entered (the Case that has happened) and that *Southan* brought an Action against her, or the Petitioners, libelling upon the said Words, for compelling them to denude or account.

In the first Case, it implies almost an Absurdity to suppose, that *Southan* could be allowed to bar the Service upon the Presence of these Words. By the Marriage-articles 1722, the Children of the second Marriage were no more than Heirs of Provision to *Southan* himself, in the Conquest provided to them; and, consequently, it was not competent, either for them to have served during his Life, or possible for him to have opposed the Service.

The same are the Consequences of the second Supposition, that he had brought an Action for compelling them to denude, or account. *Southan* himself, therefore, did not properly acquire any Right in consequence of Mrs. *Marjory*'s Marriage-contract: In 1746, *Marjory* had not properly a Right in her; *Southan*'s second Marriage was then subsisting; she might have died before its Dissolution, and no Conquest might have been made. Thus, she had no more than a *pes successus*, which might eventually have proved worth nothing, and, of course, she could then transmit nothing to *Southan*. The Fee of the Conquest remained in himself during his Life, and it was only demandable at his Death; if so, the Words could not possibly operate in his own Favour; but, if they did not operate in favour of himself, neither could they in favour of his Heirs claiming under him, as no Right could possibly descend to them, that was not in their Predecessor.

But, supposing it possible for *Southan* to acquire any Right by the Words in *Marjory*'s Marriage-contract, the only Construction that can, consistently with Mr. *Thompson*'s Argument, be put upon them, is, that *Southan* meant to make a Purchase from his Daughter

ter of her Right; which amounts to this other Absurdity, that *Southdun* purchased from his own Child a Right which that Child had to succeed to himself *after his Death*: That is an extremely anomalous Sort of a Transaction or Purchase, which it cannot be supposed any Party would think of making.

Indeed, on attending to Circumstances, it is humbly thought, your Lordships will not be of opinion, that *Southdun* intended to give the Transaction here made the Effect for which Mr. *Threip-land* contends. In the *first place*, your Lordships observe the 10,000 Merks were not given with Mrs. *Marjory*, merely as her Share of the Conquest, but the Portion was further given *in Name of Tocher*. *Actus agentium non operantur ultra intentionem eorum*; and the Intention had on the present Occasion, is extremely obvious from the Words of the Marriage-contract 1748: That Intention is expressly mentioned in the Deed itself; it is not there said, that *Southdun* intended to make any Purchase from his Daughter; but his Intention was to give her a *Tocher*, as was natural to do on Occasion of her Marriage, to Accompt of her Interest in the Conquest.

In the *second place*, It has been observed, that *Marjory* does not expressly grant any Renunciation or Discharge; a Circumstance of which the Consequences are important; because, though special Provisions are presumed in some Cases to be discharged, general, uncertain, or *future* ones, like the Legitim, or a Provision of Conquest, that are not competent at the Time, or consist *in spe* merely, are never presumed to be discharged, for a most solid Reason, That the Provisions themselves are indefinite, and their Extent is unknown. Justice, therefore, will not allow it to be presumed, that any Person, on receiving, perhaps, a trifling Consideration, means to discharge a Claim much more important, that was not, perhaps, under the Eye of Parties at the Time, and may possibly amount to a vastly larger Sum; clear, express, and unambiguous Words, are required for that Purpose; and so your Lordships have uniformly found, as oft as the Case has occurred.

With respect to the Legitim, the Thing admits of no Doubt: It is there held, that a Child is never excluded from his Bairns Part, unless he has *expressly* renounced it. So it was adjudged 24th *February* 1627, *Ross* against *Lilly*, observed by *Spottiswood*, under the Title, *Forisfamiliation*;—14th *February* 1677, Duke of *Buccleugh* against the Earl of *Tweeddale*;—16th *July* 1678, *Murray* against *Murray*,

ray, both reported by *Stair*.—And, in the Case of *Nisbet of Dirleton*, collected by Lord *Kaims*, and affirmed in the last Resort.

The same thing holds with respect to every other general Claim, as has been established in a Variety of Cases; particularly, 27th July 1671, *Baillie* against *Baillie*—and 24th June 1681, *Dowds* against *Dowds*, both observed by *Stair*; and was specially decided in the Case of a Claim of Conquest, extremely apposite, 4th February 1726, *Giffen* against *Marjoribanks*, observed by Lord *Kaims*.

The Application is obvious: *Marjory* did not grant any Discharge, nor does her Marriage-contract contain any such Words, that do clearly import one; but the utmost that can be said is, that they may, by a forced Interpretation, be construed into a Discharge, which, however, it has been shewn, is not permitted by Law to be done in any Case; but, particularly, cannot be allowed in the present, on account of its peculiar Circumstances. For,

In the third Place, it is well known, that, in all Marriage-contracts, in which it is intended a Daughter shall have no further Claim upon her Father, clear and *express* Words are actually inserted, by which she *discharges* him, or *releases* of her Portion in full. That is not done here, and the Omission must certainly have had some Meaning, because it cannot be supposed, that the Parties would have omitted a Clause, known to be so common and so necessary, unless they had made the Omission *ex proposito*, that the Person, to whom the Portion was given, might not be excluded from these Claims.

It will not be pretended, that *Marjory* was excluded, by the Words inserted in her Marriage-contract, from her Legitim; *a fortiori*, it could not be intended to exclude her from the *Conquest*, which was a Claim incomparably more valuable.

4th. The Time, at which *Marjory's* Marriage-contract was executed, deserves Notice. It was in 1748, many Years *before* the Dissolution of *Southwell's* second Marriage, of which the Children were provided to the *whole* Conquest, or could be precisely ascertained. In these Circumstances, a *Dissolution* of the Claim cannot be inferred, without the clearest Words, but, on the contrary, all that can be supposed to have been intended, or done, was to give *Marjory* some thing adequate to the supposed Abilities of her Father, Situation of Affairs, and Amount of the Conquest at the time: It could never be meant to discharge, *per artem*, the *whole* Claim competent

competent to her. *Southdun* would not even have accepted of *such* Discharge, for the trifling Portion he gave, as he knew, and it was extremely probable, that the Conquest might be greatly augmented before the Dissolution of the Marriage. In fact, that was the Case; the great Bulk of the Conquest was acquired after the 1748, particularly the Lands of *Northdun*, which yield about 200 *l. Sterling* a-year, and may easily be supposed, in that Part of the Country, to be worth 6000 *l.* or 7000 *l. Sterling*. In these Circumstances, it would be hard, indeed, to give so strong an Effect to these few Words, thrown, perhaps, *per incuriam*, without any Meaning or Intention, into *Marjory's* Contract, as to cut her, for a perfect Trifle, out of her Claim to her Share of so valuable an Acquisition, which she could not have in her Eye at the time.

In Fact, 5^{to}, your Lordships have strong Evidence, from the Bond 1757, that *Southdun* did not understand himself to have got any such Discharge. From that Bond, three Things are apparent: *first*, That the 10,000 Merks were not the *whole* which he intended for her in all Events, but the *Portion* which, in his then Circumstances, he designed for her in one Event only, *viz.* in the Event of his having *Heirs-male*. In 1748 his second Marriage was subsisting, and he had the Hopes of Male-issue, therefore, the Tocher he then gave was small; but after he found he had no Sons, and the Extent of the Conquest was increased by new Acquisitions, Justice required that her Portion should be augmented, which was accordingly done by the Bond for 8000 Merks, granted in 1757: And this Bond shows, 2^{dly}, That *Southdun* did not understand the first 10,000 Merks to be either given, or accepted, in *full*. On the contrary, the Bond says, that the 10,000 Merks should only be in full, *together with* the additional 8000 thereby given, and even that was not all which *Southdun* intended for *Marjory*. For, 3^{dly}, Besides increasing her Portion in 1757, that Bond contains an Exception, couched in strong Terms, by which he expressly reserves to her, her Right of Succession to all and each of his Estates (without *any* Exception, either of those conquest during his second Marriage, or of any others,) in consequence of her *Right of Blood*, as well as *any* Settlement, *made* or to be made in her favour. This Exception must certainly have been intended for some Purpose; and as it is clear that, if *Southdun* had left any Estate to be taken up by his Heirs *ab intestato*, Mrs. *Marjory* would have been entitled, by virtue of that excepting Clause, to have succeeded to it,

in Right of Blood, so it seems that she should much more be entitled to succeed, in consequence of a Marriage-contract, by which an Estate was anxiously bound down to her. The Marriage-contract 1722 was a solemn Settlement, made in favour of the Children of the second Marriage, which bound *Southden*, and he could not disappoint or alter, but remained effectual at his Death; and, therefore, if it should be supposed, that he had truly intended to exclude *Marjory*, and that she had renounced her Right in 1748, the Bond 1757, with the excepting Clause therein contained, may fairly be interpreted to import a *Release* granted by him in favour of *Marjory*, by which he restored her, or re-conveyed, all Right which had been originally competent to her.

That might fairly be insisted to be its Effect, even if *Marjory* had granted a Renunciation and Discharge in explicit Terms; but she has not expressly granted any Discharge, nor does the Contract contain any Words, proceeding from her, that import one. The Party with whom *she* was treating, was Mr. *Dunkar* her Husband, and Sir *Patrick Dunkar* his Father; and the only Provisions or Articles, of which she *accepted*, were those in which Sir *Patrick* and Mr. *Dunkar* bound themselves to her: Instead of treating with her Father, he was the Party that treated with Sir *Patrick* in her behalf; his Advice, with which the Contract was concluded, was only intended for directing her, concerning her agreeing to the Terms offered on the part of the Bridegroom. The Contract contains no Articles that passed between her and her Father, nor any Hint of such, without which it does not occur that any *far* could possibly be acquired by it *from her* to *Southden*; and the Words on which Mr. *Thompson* lays hold, are only thrown by *Southden* into the Obligation granted by him to Sir *Patrick Dunkar*. They could not therefore impinge upon the Right of Mrs. *Marjory*, to whom the 10,000 Merks were not even paid, but all that was covenanted was a moderate Jointure, commensurate to them, and determinable at her Death.

In these Circumstances, the Words cannot be interpreted against her. In all Cases, Words that are doubtful or obscure, are interpreted *contra proferentem*. Those here used are not explicit, and do not express, *in terminis*, the Sense endeavoured to be put upon them; and they are in no View Mrs. *Marjory*'s Words: she did not direct the Contract, and they are not contained in any Sentence

tence or Clause uttered or proceeding from her; but they are *Southdun's* Words, contained in the very Sentence in which he binds himself to pay the 10,000 Merks; and, therefore, as he did not express his Meaning with Fullness, and without Ambiguity, to be, that he intended and understood Mrs. *Marjory*, by accepting of that Portion, to discharge and renounce her total Claim; that Ambiguity must be construed against himself, nor can he or his Heirs be allowed to take an Advantage, which he did not openly and plainly declare to his Party, that he understood her to be granting, and himself to be receiving.

In this View, the Transaction itself cannot, in Law and Justice, be sustained, *to the Extent* for which Mr. *Threipland* contends, but is even reducible at the Instance of the Party lesed by it. In one Sense, Children, as well as Wives, become *Creditors* in the Provisions made for them by the Marriage-covenants concluded between their Parents, and the Law has laid the Father under certain Disabilities in their favour, particularly, that he cannot gratuitously alter the Order of Succession, or do any other voluntary Deed, by which the Children will be disappointed of the Provisions covenanted for them. The Transaction which *Southdun* is here supposed to have made, it cannot be denied, will have that Effect, in case it shall be sustained, to make *Marjory's* Share of the Conquest descend, not to herself, or the Petitioners in her Right, but to *Southdun's* Heirs of Line. No Words will disguise, that this was a direct Contravention of the Obligation under which *Southdun* came by the Marriage-contract 1722. The Deed supposed to have that Effect, as it has been already observed, was, in the most proper and strict Sense, his own Act. It may therefore be justly considered, as a Deed contrived and executed for disappointing the Children of full and honest Implement of their Provisions.

And, however it may be alledged to be for the Good of Families, that a Father should have the Power of *Division*, the Petitioners cannot see it to be either their Interest, or agreeable to Law, that he have it in his Power to *disappoint* his Children of the Provision covenanted for them, or, for 5000 *l. Sterling*, to put them off with 10,000 Merks *Scots*.

Nor can this Portion prevent the Deed from being held to be gratuitous, because it was plainly so *quoad* the Excess by which
Marjory's

Margery's Share exceeds the 10,000 Marks; and it cannot be doubted, that such Deed granted or taken by *Sauðdan*, would have been reducible in every Question with third Parties; much more, therefore, must it be reducible in a Case, like the present, where it is supposed to operate in favour of the Father himself.

By the Civil Law, every Contract or Transaction between a Father and his Child, remaining in *familia*, was reprobated on account of the *Inequality* which the *patria potestas* produced between the Parties. The Authority and Influence, which that Power gave the Father, was justly supposed to put the Parties upon Terms extremely unequal, to put it in the Power of the Father to constrain the Child to agree to any Terms he proposed, and to deprive the Child of the Freedom, which, in every Contract, a Party ought, in Justice, and is necessarily required to have.

The *patria potestas* is not, with us, carried the Length it was among the *Romans*, but still it is not without considerable Effects, particularly, on occasion of Marriage: A Child, going to enter into that State, is not allowed to be oppressed by his Parent, but every Deed, which the Parent obtains, that is *contra fidem tabularum*, is reducible on account of the *Inequality* supposed to exist between the Parties, because it is presumed, that a Person, after his Affection or his Honour is engaged, will agree to any Terms rather than be disappointed of the Match.

This is well illustrated in the Principles of Equity (p. 106, and 107), where, in speaking of Deeds taken from the Bridegroom by his Father, it is said, "every *such* Paction is by Construction of Law *extorted* from him, and the Construction is just, considering his dependent Situation; the Fear of breaking off the Marriage-treaty leaves him not at Liberty to refuse any hard Terms that may be imposed by his Father, who settled the Estate upon him."

And the learned Author illustrates the Principle by a Variety of Examples taken from *English* as well as *Scotch* Precedents.

And your Lordships must recollect many Cases, in which a Party has been restored, even against *his own* Deed, Covenant, or Obligation, granted on occasion of his Marriage, on this very account, that they were in a manner *extorted* from him, or he was not upon
an

an equal Footing with his Party: A Number of them are collected in the Dictionary, under the Title *Paſtum Illicitum*, but it is unnecessary to quote them, as the Principle will not be disputed.

And it is on a double Account applicable to the present Case, because *Southdun* here had the Power of dividing the Conquest, at least with the Consent of his Wife, which he could easily obtain; and, therefore, Mrs. *Marjory* did not treat with him upon equal Terms. If she had refused to accept of any Provision he chused to allot to her, she was at his Mercy, and he could even have put her off with less.

In these Circumstances the Inequality is manifest, and any *Lesion* occurring in the Transaction, would, it is thought, be, in Law and Justice, Ground sufficient for setting it aside. Actual Force is not required to reduce Deeds, but Extortion, or any undue Influence, that puts Parties on an unequal Footing, is held to be sufficient for the Purpose. Thus, Deeds, taken from Persons under Caption or in Prison, are reducible on that very account, without *further*, and it is not required that Force or Menaces or other undue Means be proved to have been employed upon them; that is presumed from the Situation of the Party, and he is not supposed to come to contract with that Freedom, which Justice requires every Party to enjoy in treating about his Affairs.

Your Lordships have already had another Instance of the same thing, in the Case of Deeds, taken from a Bride or Bridegroom on occasion of their Marriage.

As therefore *Marjory* could not here treat upon a Footing of Equality with her Father, while the Power of Division hung over her Head, the Transaction would have been reducible, even if she had in express Terms granted her Father a Discharge or Assignment to her Share of the Conquest. If so, Words, strong and clear indeed, must be required to show it to have been her *animus* and Intention to accept of the Portion, *then* given, in *full* of her Claim of Conquest.

Indeed, her Acceptance cannot, in the Circumstances above mentioned, be inferred to any Article, expressed or implied, between her and her Father. If it had been intended on any Side, that she should renounce her total Claim, an explicit

Claufe would certainly have been inferted to that Purpose, agreeably to the Practice known to be uniformly obferved in the like Cafes. That Omiffion could not be without a Meaning, and giving it the Effect for which the Petitioners contend, "That it muft have been defigned to preferve *Maifon's* Claim "to the Refidue of the Conquest intire to her," makes the Transaction, with the Intentions of all Parties, to have been fair and honeft, which the Petitioners do fincerely believe them to have been on all Sides. But that cannot be faid of Mr. *Threipland's* Argument, which, on being attentively confidered, refolves into this, that *Scathden* intended both to difappoint the Effect of the Contract 1722, and to defraud the Children of the fecond Marriage of the Provisions folemnly contracted for them, a Suppofition too violent for Mr. *Threipland* to impofe.

Equity and Juftice require, that all Transactions, pretending to be onerous, be really and truly equal on both Sides, and it is not enough to fay, that the Bargain here made was a Bargain of Chance: thefe Chance-bargains, in order to be fufained, muft at leaft be concluded in explicit Terms, and it muft be put out of all Doubt, that the Parties truly intend to conclude in that Manner, the one to make over the *Chance*, and the other to purchafe it, at the Price prefently advanced, which it has already been fhown, was not the Cafe here.

By the *Roman Law*, *quodam de hereditate viventis*, was reprefented in all Cafes, and Effect was denied to Transactions by which a Party made over the Interelt which he had or might accrue to him by an Inheritance before the Succeffion opened: The very Cafe here fuppofed is decided by the ableft of all the *Roman* Lawyers; and a Difcharge, by which a Daughter or Child, on occafion of her Marriage, renounced or difcharged her Right or Interelt in his Succeffion, in confideration of a *Tacher* paid at the Time of her Marriage, is declared by him to be void: *Papinian. in L. 16. ff. De jure et legit. Tutor. fays. Pater ex hereditate dotuli comprehendit, filium ita dotum accepit, ne quid aliud ex hereditate patris fperaret: cum preftitutum juxta hereditatem matris accepit; privatorum enim conditionum legum nulli doti non cedit.*

Further, the *Roman* Lawyers were fo fenfible of the Injuftice which Parties might fuftain by them, that they would not even admit

admit of a Transaction about an Interest in a Succession that had *already devolved*, before the Settlements were opened, and their Contents were known to the contracting Parties. So it is laid down by *Gaius* in the famous L. 6. ff. *De transact. De his controversiis, quæ ex testamento proficiuntur, neque transigi neque exquiri veritas aliter potest, quam inspectis cognitisque verbis testamenti*: And the Regulation was by no Means improper.

Its Application has been already made: The Portion was given with *Mrs. Marjory*, not only before the Succession opened to her, but also before the Amount of the Conquest was certainly known. It was greatly augmented after the 1748, and may perhaps be supposed to amount to 8000 *l.* or 10,000 *l. Sterling*. In these Circumstances, the Law will hardly allow *Southdun*, or his Heirs of Line, to carry off this large Sum, for the paltry Consideration of 10,000 Merks: That would indeed be an unequal Bargain, clearly contrary to material Justice and Equity, and such as Law will never support, without an *absolute* and an *indispensible* Necessity, which it is impossible to get over: But the Petitioners are hopeful they have already shown solid Grounds for denying it that violent Effect.

Southdun's Heirs of Line can never claim more than he himself could have demanded; and therefore it may be supposed, that he himself is the Party here, in which Case it is not believed he would have been heard to plead, that he was intitled to hold or take *all Mrs. Marjory's* Share: *His own Deed* would have met him, in which that Share is expressly declared by himself to be 10,000 Merks; he could never maintain that her Share was more than the Sum to which it was taxed by himself: That therefore is the only thing, which *he* could in Justice be said to have purchased, and *his* Claim could never go farther.

Put the Case, that, besides *Marjory*, there had been nine or ten other Children of the second Marriage alive in 1748, but that they had all happened to die before its Dissolution, or before his Death: The Petitioners would ask on this Supposition, whether *Southdun* would, in consequence of the Renunciation or Discharge of *Marjory*, have been entitled to retain or take the *whole* Conquest? that would plainly have been the Consequence on *Mr. Threipland's* Argument, that she was intended to be totally excluded?

excluded? yet Justice would never allow her Renunciation to be carried that unequal Length, and so your Lordships found in the similar Case already quoted of Sir *Edward Gibson*, against *Mary Johnson*; but if she was not totally excluded, the Question returns, To what Extent ought her Exclusion to operate? Whether ought it to extend to a Tenth, a Sixth, or a Half of the total Claim? it cannot surely be rated in the last Manner, because Children might have been born or died after the 1748, who were equally interested in the Provision, and therefore the only just or equal Rule is, that *Southam*, or his Heirs, can retain or claim no more than the precise Sum actually paid by him.

Suppose again, that Mrs. *Mary* had been the only Child of the second Marriage, and that *Southam*, in her Marriage-contract, had obliged himself to pay, with his Daughter, the Sum of 10,000 Merks, in the following Terms, in name of Techer and as the Conquest; could *Southam*, on this Supposition, for the Sum of 10,000 Merks, be allowed to pocket no less than 8 or 10,000 *l. Sterling*? it is not believed he would; but the Law, holding he had committed a Mistake in estimating the Conquest, would correct the Error into which he had fallen.

Put the Case of a common Bond for 5000 *l. Sterling*, that a Person ignorant of the Contents, or without looking to the Bond, is prevailed on to accept of 10,000 Merks, and to grant a Discharge for that Sum, in the following Terms; “as the Sum contained in that Bond,” is it possible to maintain, that the Debtor could avail himself of that Discharge, to hinder the Creditor from recovering the full Balance justly due? It is not apprehended he could. But if he should adventure to plead upon the Discharge, the Creditor could justly reply, on the Terms in which it was conceived, that the Discharge was not total, but limited to a specifick Sum, and therefore could not, consistently with Justice, operate to a greater Extent.

This is precisely the Case here, with this only Difference, that the present is a much stronger Case, because Mrs. *Mary* did not grant any Discharge, but all which was done was, that *Southam*, in his Obligation, happened to fix, the 10,000 Merks were paid as her Share of the Conquest. He does not say, “it was her “Share,” but that he was to pay it *as such*, and therefore, if it was
less

less than the real Amount of that Share, as she was, in Justice, so it is humbly hoped, she will, in Law, appear intitled to demand the full Balance resting to her.

In the Civil Law, Children, who had got a Portion, were allowed Action to obtain the *supplementum legitime*, an Action which was founded in material Justice ; and, upon similar Principles, the like Claim will not, it is humbly hoped, be denied the Petitioners in the present Case.

May it therefore please your Lordships, so far to alter the aforesaid Interlocutor, and to find, that Mrs. Marjory, the Petitioners Mother, was not excluded, by the Words thrown into her Marriage-contract, from claiming her just Provision of Conquest above mentioned, and that the Petitioners, in her Right, and in consequence of her Service, are intitled to take the same.

According to Justice, &c.

GEO. WALLACE.



[Referred to in a Petition for *Henrietta, &c. Sinclairs.*]

To the Right Honourable the Lord Auchinleck,

T H E

R E P R E S E N T A T I O N

O F

Mrs. *Katharine Sinclair*, second Daughter procreate of the Marriage between the deceased *David Sinclair* of *Southdun*, and the also deceased Mrs. *Marjory Dunbar*, his second Wife; and of the Children now surviving, procreated of the Marriage between *James Sinclair* of *Harpdale*, and the deceased Mrs. *Marjory Sinclair*, his Wife, eldest Daughter procreated of the said second Marriage of *David Sinclair* of *Southdun*, and also of the said *James Sinclair* of *Harpdale*, their Father, and Administrator-in-law, for his Interest, Defenders;

Humbly sheweth,

THAT, in the several Processes depending against the Representers and others, the one at the Instance of *David Threipland*, only Son of Dr. *Threipland*, and another at the Instance of *James Sinclair* of *Duran*, Esq; Your Lordship was pleased, of this Date, to pronounce the following Interlocutor: “ The Lord Ordinary having considered the De-
Feb. 11th, 1757.
bate, with the several Writings therein referred to, finds, that
“ Mrs. *Marjory* and *Katharine Sinclairs*, the Pursuer’s Cedents, having been the only Children of the Marriage, between *David Sinclair* of *Southdun*, and Mrs. *Marjory Dunbar*, were intitled to full
“ Implement of the Provisions to the Children of that Marriage,
“ in terms of the Marriage-articles between their Parents, viz.
“ 10,000 Merks, and the whole that should be conquest during
“ the

“ the Marriage, the Conquest being declared to be what *Southdun*
 “ should have at the Dissolution of it, over and above the Land-
 “ estate he was then possessed of, and after Payment of all Debts
 “ he was then owing, or should be owing at the Dissolution of the
 “ Marriage: But finds, that neither of these Daughters was intitled
 “ of the aforesaid Provision, in respect the Father, by the Concep-
 “ tion of the Contract, had the Power of Division; and therefore
 “ finds, that though, in his Daughter *Mary*’s Contract of Mar-
 “ riage, he settled 10,000 Marks upon her, as her Share of the
 “ Conquest, which was effectual to cut out *Mary* and her Heirs,
 “ who behaved to rest satisfied with the Division he made, he still
 “ continued bound to make good the Provisions to the other Heir
 “ of the Marriage, Mrs. *Katharine*, so far as Mrs. *Mary*’s Share
 “ had not exhausted them; and, before Answer to the Question,
 “ how far Mrs. *Katharine* was cut out from claiming her Share
 “ of the Provisions, appoints her to make distinct and pointed An-
 “ swers to the Questions put to her by the Defender, contained on
 “ a Paper apart, and to subscribe her Answers, and return them to
 “ this Proceeds as soon as may be.”

Of this Interlocutor, the Representatives must submit to Re-con-
 sideration, that Part expressed in the following Words: “ Finds,
 “ that though, in his Daughter *Mary*’s Contract of Marriage,
 “ he settled 10,000 Marks upon her, as her Share of the Conquest,
 “ which was effectual to cut out *Mary* and her Heirs, who be-
 “ haved to rest satisfied with the Division he made,” for the follow-
 ing Reasons:

1st, On the Principle established by the Interlocutor, that if ei-
 ther of the Children of the second Marriage continues to have the
jo ceditio on that Marriage-contract still entire, it is immaterial,
 and *pro tanto* to *David Threipland*, to have the Question determin-
 ed in this Proceed between the Children, or Descendants of *South-
 dun*’s second Marriage, whether Mrs. *Mary* and her Heirs were
 cut out, in consequence of the 10,000 Marks contracted at the Time
 of the Marriage to Mr. *Duchal*, because it is fixed by the Inter-
 locutor, that Mrs. *Katharine*’s Interest would nevertheless remain en-
 tire, upon which Supplication Mr. *Threipland*’s Interest cannot be
 affected, or influenced by the Decision of the other Point.

2^{dy}, Your Lordship has not before you any proper Process or
 Litigation between the Descendants of *Southdun*’s second Mar-
 riage, for determining that Question, and as they are determi-
 ned

ned not to have, if they possibly can avoid it, any Law-suit about the Matter, but to settle it in an amicable Manner, so your Lordship will not be supposed to determine that Point, which may arise between them incidentally in the present Question, unless it shall appear absolutely necessary for the Decision of the present Cause, nor will you lay either of the Parties under the indispensable Necessity of immediately taking Arms, and going into a Litigation between themselves, if it can possibly be avoided, as will easily be. For,

3tho, If in the Event it shall be found, that Mrs. Katharine does still retain her *jus crediti* full and entire, in that Case it would in this Process be absolutely useless to give any Decision, with respect to the other Daug't r Mr. Marjory's Right; therefore it is submitted, that that Part of the Interlocutor above recited should be altered or varied, and that no Decision ought to be given thereupon, at least till the Question concerning the *jus crediti* competent to both Daughters, be fully ripe and ready to receive Judgment at one and the same Time.

MAY it therefore please your Lordship to alter or vary your Interlocutor in the Part above recited; at least to supersede giving any Judgment upon the Question, How far the 10,000 Merks, contracted in Mrs. Marjory's Marriage-articles were effectual to cut out her and her Heirs from the Benefit of the Marriage-contract, that passed between South-dun and her Mother, till the other Question concerning Mrs. Katharine's Right, becomes ripe for receiving a final Judgment.

According to Justice, &c.

GEO. WALLACE.

A N S W E R S

F O R

DAVID THREIPLAND - SINCLAIR of *Southdun*, and STUART THREIPLAND of *Fingask*, his Father and Administrator in Law ;

T O T H E

PETITION of *Henrietta, Janet, Æmilia* and *Margaret Sinclairs*, only Children alive of *James Sinclair* of *Harpisdale*, Esq; by the deceased Mrs. *Marjory Sinclair* his Wife, and of the said *James Sinclair* of *Harpisdale*, their Father and Administrator in Law.

UPON the 12th of *March* 1722, the now deceased *David Sinclair* of *Southdun* entered into a contract of marriage with Mrs. *Marjory Dunbar*, daughter to Sir *Robert Dunbar* of *Northfield*, his second wife ; by which contract he, *inter alia*, bound and obliged himself and his heirs, “ to provide, secure, and make payment to the children of the marriage the sum of 10,000 merks, to be divided and distributed among them by their father, with consent of their mother, during their lifetime ; and failing such distribution or division, by two of the nearest of kin on the father’s side, and two on the mother’s side :” Which provisions were to be paid at the first term of *Whitsunday* or *Martinmas* next after the said *David Sinclair* his death, under a penalty, with annual rent thereafter ;
and

and he thereby farther became bound, " That whatever lands, heritages, sums of money, or others whatsoever it should happen him to conquest or acquire during the marriage, he should provide and secure the same in manner following, *viz.* The one half to the said Mrs. *Marjory Dunbar* in life, for her life, for her use alienably, during all the days of her lifetime, and that by and attour her life, provision therein above written, and the whole to the children of the marriage in fee, to be divided among them in manner above mentioned; declaring, that nothing should be reputed conquest, but what he should be worth at the dissolution of the marriage, beyond his then land estate, and after payment of all his just and lawful debts then contracted, or to be contracted by him during that marriage."

OF this marriage there having been two daughters procreated, *Marjory* and *Katharine*: *Marjory*, the eldest, was married to *John Dunbar*, only son of *Sir Patrick Dunbar* of *Northfield*, her mother's brother; and by contract of marriage entered into betwixt them, with consent of both their fathers, upon the 24th *February* 1748, " The said *Sir Patrick Dunbar*, in contemplation of that marriage then to be solemnized, and in consideration of the *tocher* therein after mentioned, made over during his own lifetime or that of his lady, the rents of certain lands to his son and his future spouse, and longest liver of them, for their *interim* aliment; which lands themselves he provided to his son, and the heirs male of that marriage; whom failing, to the ~~his~~ heirs male of any other marriage; whom failing, heirs male to be procreated of the father's body; whom failing, to the heirs female to be procreated of the son's body, of that or any other marriage; and he farther provided his other estate, after his decease and that of his lady, to his son and future spouse in common fee and life, and the heirs above mentioned. *For which* *anster*, and on the other part, the said *Douglas* became bound to content and pay, in name of *tocher* with his said daughter, and in her share of the conquest, to the said *Sir Patrick Dunbar*, his heirs or assigns, including executors, the sum of 10,000 *merks*, at the terms, and with annuities as therein mentioned;" which sum of 10,000 *merks* was afterwards paid to *Sir Patrick Dunbar*, who thereupon granted a discharge thereof.

SOUTH DUN intermarried with Mrs. *Margaret Murray* his third wife, daughter of *James Murray* of *Clairden*, without any antenuptial marriage settlement; but being resolved to settle his whole land estate by a postnuptial contract upon the issue male of that marriage, and to make suitable provisions for his wife in case of her survivance, and being desirous to do every thing in his power to prevent disputes among his children and successors, he, of this date, two days before entering into this postnuptial contract, granted a bond to the said Mrs. *Katharine Sinclair*, the youngest daughter of his second marriage, for 1000 *l. Sterling*, payable at the first term after his death, in full satisfaction to her of her share of the provision granted by him in the contract of marriage betwixt him and his deceased spouse, in favour of the daughters of that marriage, failing heirs male; and in consideration and full satisfaction to her of her share of the provision of conquest of lands, heritages, and others whatsoever, which should be acquired during the marriage, granted by him in favour of the daughters of said marriage, &c. And the year following, he granted a bond of 8000 merks in favour of the said *Marjory Sinclair*, the eldest daughter of his said second marriage, and to *James Sinclair* of *Harpisdale*, to whom she was then married, in conjunct fee and liferent, for their liferent uses allanarly, and to their children in fee, payable at the first term of *Whitsunday* or *Martinmas* after his decease: By which bond it is declared, That the said sum of 8000 merks, and the sum of 10,000 merks formerly paid by him to his said daughter in name of tocher, and as her share of the conquest, was granted by him, and accepted by her and her said husband in full satisfaction to her of her share of the provisions granted by him in the contract of marriage betwixt her deceased mother and him, in favour of the daughters of the marriage, failing heirs male; and in full satisfaction to her of the provision of conquest of lands and heritages whatsoever, which should be acquired by him during the marriage granted by him in favour of the daughters, failing heirs male, and in full satisfaction to her of her portion natural, bairns part of gear, share of moveables, legitim, or other pretensions whatsoever, which she, as one of the daughters or children of said marriage, could in any ways ask, claim, or pretend right to by or through her said mother's decease, or his the said *David Sinclair's* decease, excepting his own good will allanarly,

July 19.
1756.Sep. 28.
1757.

and

and her succession to his estate, if the same should fall to her by right of blood, or any settlement made or to be made by him. This bond was found in *Southdun's* repository after his death.

SOUTHDUN died in the year 1760, and left issue by Lady *Janet Sinclair*, his first wife, the respondent *David Threipland-Sinclair*, the only son of Mrs. *Janet Sinclair*, *Southdun's* daughter of that marriage; the said *Marjory* and *Katharine Sinclairs*, daughters of his second marriage, and *Margaret Sinclair*, the only child of his third marriage, who also has a provision of 1000 *l. Sterling*.

THE said *Marjory Sinclair* died, leaving issue by her second husband *James Sinclair* of *Harpsdale*, *George-Marjory Sinclair* their only son, and the petitioners, *Henrietta, Janet, Emilia* and *Margaret Sinclairs*.

THE said *Marjory* and *Katharine Sinclairs* were served heirs of conquest and provision in special to *Southdun* their father in certain lands acquired by him during the subsistence of his marriage with their mother; and the foresaid *George-Marjory Sinclair* was served heir of line and provision to his mother *Marjory*.

MAY 15. 1760. MR. SINCLAIR of *Harpsdale*, as tutor and administrator in law to his son *George-Marjory*, and the said Mrs. *Katharine Sinclair* purposing to claim the lands and other subjects acquired by *Southdun* during his second marriage, and to repudiate the special provisions made for them; and being advised that this could be more properly done in the name of a trustee, they, by their assignation and disposition of this date, upon a recital of the said service, and that the rights and conveyances of the several conquest subjects having been taken to the said *David Sinclair* and his heirs and assigns whatsoever, it became necessary to have the right and title to the same vested in a trustee for their behoof: Therefore they " assigned and disposed to *James Sinclair* " of *Dunelm*, and his assigns, all right which they had in virtue " of the contract of marriage before recited, to the heritable sub- " jects which were conquest and acquired by the said *David Sinclair* " at *Southdun*, during the foresaid marriage, and that in trust for " their behoof, for the purpose annually of obtaining decreets of " constitution and assignation in implement of the said contract " and that them and the heirs hereof of the said *David Sinclair*

“ of *Southdun*: And further, for that purpose, and also for the
 “ purpose of suing the said heirs of line, and the other heirs and
 “ representatives of the said *David Sinclair*, not only for pay-
 “ ment of the said 10,000 merks, and interest thereof, but also
 “ for relief of the said debts due by him, in manner foresaid; they
 “ thereby made and constitute the said *James Sinclair* their lawful
 “ cessioner and assigney also in trust, in and to the foresaid prin-
 “ cipal sum of 10,000 merks provided by the said *David Sinclair*
 “ to the children of his second marriage, by the contract of mar-
 “ riage before recited, penalties stipulated therefore, and interest
 “ of the said principal from and since the term of *Whitsunday*
 “ 1760, being the first term after the decease of the said *David*
 “ *Sinclair*, and in time coming while payment; and in and to
 “ the said contract of marriage itself, hail heads, tenor, and con-
 “ tents thereof; and the special and general services before men-
 “ tioned, with all that further has followed, or may be compe-
 “ tent to follow on the same; and all action, instance and exe-
 “ cution competent thereupon; with power to the said *James*
 “ *Sinclair* to call and pursue for implement of the provision of
 “ conquest, and others contained in the foresaid contract of
 “ marriage, to which they had right, in manner foresaid: As
 “ also, for payment of the foresaid principal sum and
 “ annualrents thereof, and for relief of the debts which were
 “ due and resting by the said *David Sinclair* of *Southdun* at his
 “ death, decreets of constitution and adjudication, declarator, and
 “ others thereupon to recover, and the same to all due and law-
 “ ful execution cause be put; and, in general, for that purpose, to
 “ do every thing concerning the premisses which they, or either
 “ of them, might do themselves.”

THE said *James Sinclair* of *Duran*, as having right by this dis-
 position and assignation to the subjects therein contained, having
 brought an action against the whole descendents of the said *Da-*
vid Sinclair of *Southdun*, as representing him, upon one or other
 of the passive titles, concluding to have it “ found and declared,
 “ that the subjects particularly mentioned in the libel to have
 “ been conquest and acquired by the said *David Sinclair*, during
 “ his second marriage, and to which the pursuer then had right,
 “ were not liable for any of the debts specially mentioned in the
 “ libel, or other debts which were contracted by the said *David*
 “ *Sinclair*,

“ *Sinclair*, and resting by him at his death : That the defenders
 “ ought to be ordained to free and relieve the pursuer, and the
 “ conquest subjects particularly therein mentioned of all those
 “ debts : also to make payment to him of the foresaid sum of
 “ 10,000 merks, with interest and penalty.”

It was pled for *David Threipland-Sinclair* of *Southdam*, one of
 the defenders in this process, “ That the obligation contained in
 “ *Southdam*’s second contract of marriage, was effectually dis-
 “ charged by Mrs. *Marjory Sinclair* the eldest daughter of that
 “ marriage, having accepted, in her contract of marriage with
 “ Mr. *Dunbar*, a provision of 10,000 merks in name of tocher,
 “ and as her share of the conquest ; and by the additional bond
 “ of provision above mentioned of 8000 merks, executed by
 “ *Southdam* upon the 28th day of *September* 1757, in favours of
 “ her and *Haysdale*, her second husband, and children ; and by
 “ the bond of provision of 1000 *l. Sterling* granted by *Southdam*
 “ upon the 19th of *July* 1756 in favours of Mrs. *Katharine Sin-*
 “ *clair* his other daughter of that marriage.”

To which the pursuer answered, “ That the 10,000 merks paid
 “ in name of tocher with Mrs. *Marjory Sinclair*, could not operate
 “ a discharge of her claim of conquest, as the tocher was not
 “ paid to herself, but to her husband’s father : Neither did the
 “ contract of marriage bear a discharge of the claim of conquest,
 “ which it cannot be thought was intended to be granted for so
 “ small a consideration, which was further evident from the ad-
 “ ditional provision of 8000 merks : and that the bond of 1000 *l.*
 “ *Sterling*, in favours of Mrs. *Katharine Sinclair*, was never ac-
 “ cepted of by her.” The Lord *Auchinleck*, Ordinary in the
 cause, upon the 11th of *February* 1767, pronounced the following
 interlocutor, upon full minutes of debate.

“ The Lord Ordinary having considered the debate, with the
 “ several writings therein referred to, finds, that Mrs. *Marjory*
 “ and *Katharine Sinclair*, the pursuer’s sisters, having been the
 “ only children of the marriage between *David Sinclair* of *South-*
 “ *dam* and Mrs. *Marjory Dunbar*, were intitled to full implement
 “ of the provisions to the children of that marriage, in terms of
 “ the marriage articles between their parents, viz. 10,000 merks,
 “ and the whole that should be conquest during the marriage,
 “ the

“ the conquest being declared to be what *Southdun* should have
 “ at the dissolution of it, over and above the land estate he was
 “ then possessed of ; and after payment of all debts he was then
 “ owing, or should be owing at the dissolution of the marriage ;
 “ but finds, that neither of these daughters was intitled to the
 “ aforesaid provision, in respect the father, by the conception of
 “ the contract, had the power of division ; and therefore finds,
 “ that though in his daughter *Marjory*’s contract of marriage, he
 “ settled 10,000 merks upon her as her share of the conquest,
 “ which was effectual to cut out *Marjory* and her heirs, who be-
 “ haved to rest satisfied with the division he made, he still continued
 “ bound to make good the provisions to the other heir of the
 “ marriage, *Mrs. Katharine*, so far as *Mrs. Marjory*’s share had
 “ not exhausted them : And before answer to the question, How
 “ far *Mrs. Katharine* was cut out from claiming her share of the
 “ provisions ? appoints her to make distinct and pointed answers
 “ to the questions put to her by the defender contained on a paper
 “ apart ; and to subscribe her answers, and return them to this
 “ process as soon as may be.”

AGAINST this interlocutor the respondent represented, and
 prayed, that the Lord Ordinary would find, that *Marjory Sinclair*’s
 renunciation of her share of the conquest must operate a dis-
 charge of the one half, and restrict *Katharine*’s share to the other
 half.

THE said *George-Marjory Sinclair*, the only son and heir of the
 said *Marjory Sinclair*, *Southdun*’s eldest daughter of his second
 marriage, having died in September 1766, a representation was
 preferred in name of his sisters, the now petitioners, and their
 father *Harpsdale*, as administrator in law for them, praying the
 Lord Ordinary “ to vary that part of the above interlocutor,
 “ whereby it was found, that *Southdun* having settled in his
 “ daughter *Marjory*’s contract of marriage 10,000 merks upon
 “ her as her share of the conquest, which was effectual to
 “ cut out *Marjory* and her heirs, who behaved to rest satisfied
 “ with the division he made.” The Lord Ordinary, upon
 the 10th March 1767, pronounced the following interlocutor up-
 on that last mentioned representation : “ The Lord Ordinary
 “ having again considered this representation, with the answers,
 “ adheres to the former interlocutor, and refuses the desire of
 “ the

Feb. 25.
1767.

Mar. 10.
1767.

“ the representation.” And of the same date, after a confession had been offered of the facts which Mrs. *Katharine Sinclair* was desired to confess or deny ; and after she had made answers thereto, pronounced the following interlocutor upon answers made for *James Sinclair* of *Duran* to Mr. *Threipland*’s representation : “ The Lord Ordinary having refused the consideration of the representation for *David Threipland* and his administrator in law, with the foregoing answers, adheres to the former interlocutor, so far as it finds the sums advanced to Mrs. *Marjory* do not preclude Mrs. *Katharine* from claiming effectual implement of the obligation for conquest, in so far as not implemented : And further, having considered the confession for the defenders, and Mrs. *Katharine Sinclair*’s answers ; and more particularly, having considered, that it is an agreed fact, that Mrs. *Katharine Sinclair*, at the time of the alleged transaction, was living in family with her father, that there is no deed under her hand renouncing her claim on her mother’s contract of marriage ; that it is not alledged that she, after her father’s death, ever made any claim upon this bond, or even in her father’s life made any claim upon it, finds, that she is not bound to accept of that bond ; and that her claim, and the pursuer’s in her right to the conquest, in terms of her father and mother’s contract of marriage remains effectual.” To which interlocutor, his Lordship, upon the 24th of *June* 1767, adhered.

AGAINST these judgments Mr. *Threipland* having reclaimed to your Lordships, you were pleased, upon advising his reclaiming petition, with answers for Mrs. *Katharine Sinclair*, on the 4th *December* 1767, “ to find Mrs. *Katharine*’s acceptance of the bond of provision granted to her by *Southam* not instructed ; and that she is not bound to accept the said bond, neither is she obliged to hold the same in satisfaction of her claim to conquest ; and in so far adhere to the Lord Ordinary’s interlocutors reclaimed against, and refuse the desire of this petition ; but, before answer as to the other points in this petition, viz. Whether Mrs. *Marjory*’s renunciation of her share of the conquest must operate a discharge of the one half, and must restrict *Katharine*’s share to the other half? appoint parties to give in memorials thereon *line inde, &c.*”

IN obedience to this last appointment, memorial's were given in *hinc inde*, and the cause heard in presence, in consequence of an after appointment of your Lordships.

UPON the 26th of *July* last, your Lordships pronounced the following interlocutor: "The Lords having advised the memorials given in *hinc inde*, and having heard parties procurators in their own presence, find, That the words of Mrs. *Marjory Sinclair's* contract of marriage in 1748 import a renunciation and discharge of the half of the conquest provided to her by her father's contract of marriage in 1722, and consequently must restrict her sister *Katharine's* share of said conquest to the other half; and therefore, prefer the heirs of line of *Southdun* to that share of the conquest now in question, which would have fallen to *Marjory*, if she had not been excluded by her contract of marriage, and decern."

MR. THREIPLAND, and his father, as his administrator in law, having, upon their part, brought an action against the children of the said Mrs. *Marjory Sinclair*, and against Mrs. *Katharine Sinclair*, libelling upon Mr. *Threipland's* right to certain lands, in virtue of a contract of marriage entered into betwixt *Southdun* his grandfather, and Lady *Janet Sinclair*, dated the 28th day of *January* 1716, and likewise upon a deed of entail executed by *Southdun* upon the 9th of *May* 1747; and subsuming, "That by decree of the court of session, dated the 9th of *November* 1763, it had been found, that the pursuer had a right to succeed to the lands of *Southdun*, and others contained in the deed 1716, as the heir of provision to his grandfather, as unlimited fiar thereof, and to other lands contained in the tailzie 1747, as heir of tailzie and provision to him; and also libelling upon *Southdun's* contract of marriage with his second wife, providing the conquest in manner therein and above mentioned; in virtue of which contract of marriage, the now deceased *Marjory*, and the said *Katharine Sinclair's* were served heirs of provision in special to their father, in certain lands said to have been conquest by him during that marriage: That the said *Marjory Sinclair*, and *James Sinclair* of *Harpsdale* her husband, had likewise been confirmed executors to the said *David Sinclair* of *Southdun*, and, as such, had intromitted with his executory: That the said *Marjory Sinclair* was excluded from her share of

“ the conquest by the contract of marriage above mentioned, en-
 “ tered into betwixt her and her first husband, and by the addi-
 “ tional bond of provision afterwards granted by her father to
 “ her and her second husband, and their children: That the said
 “ *Katharine Sinclair* was likewise excluded from her share of the
 “ conquest by the above mentioned provision of 1000 *l. Sterling*
 “ granted to her.” And CONCLUDING against the defenders,
 “ That as it thence appeared they had made up an erroneous title
 “ to the subjects said to have been conquest by the deceased *South-*
 “ *den* during his second marriage, they should exhibit the service
 “ as his heirs of conquest, and the retour thereof, with the pre-
 “ cept and infeftment following thereon, in order to be reduced ;
 “ as titles to the conquest subjects which were taken by *Southden*
 “ to himself and his heirs whatsoever, could only be made up
 “ by his heirs of line, however the issue of the second marriage
 “ might be creditors in virtue of that clause of conquest: And
 “ likewise concluding, That it should be declared, that that pro-
 “ vision of conquest was effectually discharged by the several
 “ deeds above mentioned ; at any rate, that the heir succeeding
 “ in the conquest subjects, and the other heirs of *Southden*, should
 “ be found liable to pay the debts due by him to the extent of
 “ the estate they succeeded to, and to free and relieve the pursuer,
 “ and the subjects he was intitled to in virtue of the contract of
 “ marriage 1716, and deed of entail 1747 above mentioned ; and
 “ that the executors should account for their intromissions.”

THERE was no farther procedure had in this process, than that
 upon the pursuer's craving certification, unless the defenders
 would take a day to satisfy the production, it was objected by
 them, that the pursuer had no title in his person to insist in that
 action, as he had not made up any title to the subject in question,
 as heir of line to his grandfather: Whereupon the Lord *Auchinleck*
 Ordinary, upon the 28th of *November* 1766, “ Having consider-
 “ ed what was then set forth, sustained the pursuer's title to insist
 “ in that action as to one third of the subjects in dispute ; and,
 “ in respect the defenders declined to take a day, granted certi-
 “ fication against them for not satisfying the production of the
 “ writs called for, reduced these writs for not production thereof,
 “ and decerned and declared.”

AGAINST this judgment a representation having been offered in name of the said Mrs. *Katharine Sinclair*, and of *Henrietta, Emilia, Janet*, and *Margaret Sinclairs*, the present petitioners, and *James Sinclair* of *Harpdale*, their father and administrator in law, the Lord Ordinary, upon the 5th of *December* 1766, " Having considered that representation, and that the representers admit, that the pursuer is the only son of Mrs. *Janet Sinclair*, daughter to *David Sinclair* of *Southdun*, and one of the heirs-portioners to the said *David Sinclair*, father to one of the representers, and grandfather to the other representers, and that a service gives no title to the predecessor's estate, and is only necessary to verify the propinquity, refuses the desire of the representation, and adheres to the former interlocutor."

AT an after calling of the cause, when the defenders, now the petitioners, " craved they might be reponed against the certification formerly pronounced, as they were willing to satisfy the production; but as that process had a connection with the former process depending before the same Ordinary, in which the writs called for were produced, *craved the Lord Ordinary would remit that process to the former, and make great avifandum with the writs therein produced,*" his Lordship, upon the 16th of *December* 1766, of consent of parties, " reponed the defenders against the certification already pronounced, and remitted that process to the said former process depending betwixt the parties before the Lord Ordinary; and, in respect the writs called for are produced in the said process, made great *avijandum* with these, and with the reasons of reduction."

AGAINST the above recited judgments, in so far as it has been thereby found, that the words of Mrs. *Marjory Sinclair*'s contract of marriage in the year 1748, import a renunciation and discharge of the share of the conquest provided to her by her father's contract of marriage in the year 1722, the petitioners have thought fit to reclaim; and they endeavour, in the *first* place, to remove an objection that appears at first view to ly against that application, namely, That the Lord Ordinary's judgments upon this point have long ago become final, as the first interlocutor was pronounced upon the 11th of *February* 1767, and the last upon the 10th of *March* that year. And they say,

THAT

“ THAT no further procedure has been, in the process of reduction at Mr. *Threipland's* instance, after great *avilment* was made with the writs produced: That in the other process at the instance of Mr. *Sinclair* of *Duran*, as trustee for Mrs. *Katharine Sinclair*, and for *George-Marjory Sinclair*, the only son of Mrs. *Marjory Sinclair*, he having died before any judgment was given therein, what followed afterwards, cannot affect the petitioners now in the right of him: That *Duran's* process was not properly an action for settling the question betwixt Mrs. *Katharine Sinclair* and the petitioners, concerning Mrs. *Marjory's* being excluded from any share of the conquest, and was only intended for settling the question, concerning the relief of debts amongst the several heirs of *Southden*: That when the Lord Ordinary pronounced this first interlocutor, which proceeded upon a debate, wherein *Duran* was the only pursuer, and Mr. *Threipland* the only defender: and though the petitioners offered a representation complaining of that interlocutor, they did not enter into the merits of the question, but only therein set forth, that it was unnecessary to determine it: That the Lord Ordinary himself seems to have avoided the determining this question, as his first interlocutor appears to be only hypothetical, and the second only to adhere to the former, in so far as it was thereby found, that the sums advanced to Mrs. *Marjory* were not sufficient to cut out Mrs. *Katharine*: and that, at any rate, the petitioners are minors, and therefore cannot be concluded before they be fully heard.

And, in the second place, Upon the supposal of the competency of that application, they endeavour to maintain, 1st, “ That *Southden* had no power to exclude his daughter Mrs. *Marjory* from her share of the conquest;” by which it is presumed, they mean he had no power to exclude her, without exerting his right of division, in the precise form expressed in the contract of marriage.

2^{dly}, “ That he did not intend to exclude her, which they infer from these circumstances, that the 10,000 micks was not given her, merely as her share of the conquest, but likewise in name of a dowry: so that it cannot be thought *Southden* intended to make any purchase from his daughter: That *Marjory* does not expressly grant any discharge of that claim, which, “ there-

“ therefore, not being expressly renounced, must be understood to
 “ be reserved as in the case of the legitim, agreeable to many deci-
 “ sions of your Lordships, quoted by the petitioners; that as in
 “ all marriage contracts, where it is intended a daughter should
 “ have no further claim upon her father, she discharges him, or
 “ accepts of her portion in full, the omission of such words, in
 “ this case, must have had a meaning, and these words must be
 “ understood to have been omitted *ex proposito*, that Mrs. Mar-
 “ jory might not be excluded from claims otherwise competent
 “ to her: That when this marriage contract was entered into,
 “ *Southdun*’s second wife being then alive, what the extent of the
 “ conquest would be, could not appear; so that it cannot be sup-
 “ posed a discharge of that claim, which might be very conside-
 “ rable, was intended for so small a sum: That from the addition-
 “ al bond of provision granted in the year 1757, it appears,
 “ that *Southdun* did not understand he had got any such discharge:
 “ That it appears from Mrs. *Marjory Sinclair*’s contract of mar-
 “ riage, that the only provision she accepted of, were those in
 “ which Sir *Patrick Dunbar* and his son became bound to her, her
 “ father being no party with whom she treated.

AND, 3dly, “ That supposing *Southdun* to have intended, by
 “ this contract of marriage, to have excluded his daughter from
 “ any interest in the conquest, that contract cannot have this
 “ effect, in regard it must be considered as the act of *Southdun*,
 “ in order to disappoint the obligation he had come under to the
 “ heirs of his second marriage, by the contract of marriage with
 “ their mother: That Mrs. *Marjory* the daughter must be confi-
 “ dered to have accepted of that provision, from the power her
 “ father had over her, and the undue influence used with her;
 “ and that transaction, therefore, in so far as it shall appear to be
 “ unequal, and Mrs. *Marjory* hurt thereby, ought to be set
 “ aside.”

To which petition the following answers are humbly submit-
 ted to your Lordships on the part of Mr. *Threipland*, and his ad-
 ministrator in law.

1st, WITH regard to the competency of the present applica-
 tion, that is, How far, at so great a distance of time, the petiti-
 oners can now be heard to complain of the above mentioned judg-

ments of the Lord Ordinary, pronounced as far back as the 11th of *February*, and 10th of *March* 1767. The respondents cannot conceive what influence it can have upon that question, that in the above mentioned process of reduction raised by them, no further procedure has been had, than that great *avysandum* has been made with the writs produced. Though it be one of the conclusions of that libel, that the claim of conquest should be found satisfied; and therefore, that that question might have been properly enough determined in the course of that process, yet your Lordships will observe, that that libel, as above recited, contains several other conclusions, the chief whereof was, that the special service of the daughters of *Southam's* second marriage, in the subjects said to be conquest by him during the subsistence thereof, with the infeftment following thereon, should be set aside as erroneous, in regard the clause of conquest could only create a debt upon the heirs of line, the rights to the subjects themselves having been taken to *Southam*, and his heir whatsoever, but could never give the issue of that marriage a right to establish the property of these subjects in themselves: How, then, can it happen, that the respondent's not insisting upon having that question determined in the other process, agreeable to one of the many conclusions of that libel, can affect the determination of the same question in the other process, where it was equally proper to determine it, does not occur to the respondents.

Minutes, their trustee, as appears from the minutes in this process, where they pleaded, " That as *David Threipland* has brought a
p. 8. " counter-process, at his instance, against *Marjory* and *Katharine Sinclair*, the children of *Southam's* second marriage, or the pursuer now in their place; which process is now remitted to this
" process, for having it found and declared, that they had lost,
" renounced, or discharged their right to the subjects conquest
" and acquired during the standing of that marriage: The Lord
" Ordinary would observe, *That the same reasons which intitled*
" *the pursuers to decree, in terms of his own libel, for payment and*
" *relief of the debts, did equally intitle him to an absolvitor from the*
" *counter-declarator pursued at the instance of David Threipland.*"
And a little after they add, " The pursuer apprehends, that the
" claim which *Marjory* and *Katharine Sinclair* had to the provi-
" ons

“ons in their mother’s marriage contract 1722, were still certain; and that the defenders fall to be assilzied from the declarator pursued at the instance of Mr. Threipland.”

NEITHER does it occur to the respondents, how the death of *George-Marjory Sinclair*, who is said to have died before any judgment was given upon the present question, can have any influence upon the after procedure in this cause. If *Mrs. Marjory Sinclair* had any interest in this conquest, it was established in her only son *George-Marjory Sinclair*, as heir of line and provision served and retoured to her. That right was conveyed by his father and administrator in law, to Mr. *Sinclair of Duran*, for certain purposes, particularly, with power to him to pursue for implement of the provision of conquest, to obtain decreets of constitution and adjudication, in implement of that contract of marriage, against the heirs of line of *Southdun*; and, in general, to do every thing concerning these matters, which the granters of that disposition themselves might do.

Mr. *SINCLAIR of Duran*, in virtue of this disposition, accordingly brought a process for these purposes. In the respondent’s apprehension, his right to carry on that process, in so far as concerned *George-Marjory Sinclair*, the only son of his mother, who had her right established in him by service, was not of such a nature as to expire like a proper mandate, by the death of the mandant, but continues at this day; so that the respondents, who are called as defenders in that process, must consider him as still the proper pursuer therein, and the party with whom the judicial contract subsists with the defenders in this process, by virtue of the litigation that has been had therein.

Mr. *SINCLAIR of Duran’s* process, as it expressly concludes, that the subjects said to be conquest during *Southdun’s* second marriage should be found not subject to any of the debts particularly expressed in the libel, or to any other debts which were contracted by him, and that the defenders should be decerned to relieve him thereof, seems to have been undoubtedly competent for having the present question determined therein. All the defenders, and particularly the respondents are called, to have it found and declared, that the conquest subjects belong to the pursuer, in the right of *Marjory and Katharine Sinclairs*, free of certain

tain debts which the defenders stand bound to pay. In this process, nothing was more natural than for the respondents to plead, that this claim of conquest is extinguished by the several deeds executed by *Scuthdun* in favours of his two daughters. The Lord Ordinary has by different interlocutors found so, with regard to *Marjory's* interest. These interlocutors from the 10th of *March* 1767, down to the present application, have been acquiesced in, so that it does not appear how by the forms of court they can now be reviewed, as the question seems to have been determined in a process extremely competent for that purpose.

THE respondents can see as little ground for the competency of this application, on account of their having only appeared as defenders in that process; and that *Duran* was the only pursuer, since any one of more defenders is intitled, so far as concerns himself, to plead every proper defence; and that *Duran* was the only proper pursuer in that action, after the above mentioned disposition and assignation granted to him. At the same time the respondents must observe, that the petitioners plainly made themselves parties to this process, by the representation offered to the Lord Ordinary complaining of his interlocutor above mentioned, dated the 11th of *February* 1767; in which representation, though it is chiefly insisted on, that it was improper to determine the question concerning Mrs. *Marjory Sinclair's* interest in that conquest, till it was determined what the consequence of her being excluded would be with respect to Mrs. *Katharine*, yet the representers expressly pray, "to alter or vary that interlocutor in the part thereof recited in that representation, which was that part whereby Mrs. *Marjory* was found excluded, or, at least, to supersede giving any judgment in that question, till the other question concerning Mrs. *Katharine's* right became ripe for receiving judgment." From which it appears plain to the respondents, that by the Lord Ordinary's interlocutor pronounced upon the 10th of *March* 1767, whereby he simply adhered to his former interlocutor, and refused the desire of that representation, that not only the former interlocutor has now become final, but that likewise the question determined by the first, is again determined by the second, after the petitioners had become proper parties to the process by the above mentioned representation,

which

which second interlocutor refusing that representation has likewise now long ago become final.

THE respondents cannot perceive any thing in the Lord Ordinary's interlocutor of the 10th of *March* 1767, that has the least tendency to show, that he purposely avoided determining the present question: By that interlocutor, a former of the 11th of *February* preceeding, wherein that question was determined, is simply adhered to, without any reference to the other interlocutor of the same date, which was pronounced upon advising a representation for the respondents, with answers thereto; and which determines altogether different points, namely, that by Mrs. *Marjory's* being excluded from any interest in the conquest, Mrs. *Katharine* was not precluded from claiming effectual implement of the obligation for conquest in so far as not implemented; and that she was not bound to accept of the bond of provision executed in her favours by her father. The first part of which interlocutor seems plainly to suppose, that Mrs. *Marjory* herself was precluded from any interest in the conquest; neither does it appear to the respondents, how it can be maintained that the Lord Ordinary's interlocutor of the 11th of *February* 1767 was hypothetical, as that interlocutor expressly bears, " That the settlement
" of the 10,000 merks upon *Marjory* as her share of the conquest,
" was effectual to cut out her and her heirs, who behoved to rest
" satisfied with the division he had made.

WITH respect to the petitioners being minors, the respondents will admit, that where competent defences have been omitted to be pled by minors, they have notwithstanding been heard thereon, though not in every case: For the respondents observe, that in a case observed by Lord *Fountainhall*, 23d *January* 1705, *Oakly* against *Tailfer*, the Lords refused to repon a minor against a decret in *foro*, though his procurator had omitted to propone this defence, *that the ground of the claim was a missive letter, promising payment for another, which was neither holograph, nor wherein the writer and witnesses were designed*; and in another case, upon the last day of *January* 1621, *Baillie* contra laird of *Silvertounhill*, it was found, that a minor could not be reponed against a decret of certification in an improbation pronounced in absence against him, upon his offering to produce the writs called; both

which decisions are taken notice of in the dictionary p. 583. volume I. But the respondents never understood that minors had any privilege in judicial proceedings, with regard to what was proponed and repelled. Agreeable hereto, the court determined upon the 7th of *January* 1698, Countess of *Kincardine* contra *Purves*, and upon the 14th of *January* 1732, *Anderjón* contra *Geddes*, both mentioned in the dictionary, p. 584. vol. I. and such appears to be the opinion of our lawyers.

LORD *Dunlop* says, p. 183. vol. I. of his *Institutes*, “ In judicial acts a minor will be restored against decrees before the Lords in *jure*, where allegations in fact or law sufficient to have absolved the minor were not pleaded, because that was the pure neglect of his tutors or curators, or proceeded from his own inadvertency; but as to allegations proponed and repelled, or points of law sustained against the minor, he is in the same case as a major, and therefore in those there is no place for restitution, that being the act of the judge, and not of the minor.”

AND Mr. *Erskine* says, tit. 7. B. 1. of his *Principles* of the law of *Scotland*, “ Though a minor may be restored against the sentence of a judge, where the proper allegations or defences for him have been omitted, or hurtful ones offered in his name; yet if the minor’s plea has been well conducted, there is no place for restitution, though the sentence should have been iniquitous.”

THE respondents humbly apprehend, that, with regard to this point of minority, it makes no kind of difference, that there has yet been no decret extractd, whereby Mrs. *Marjory Sinclair*’s interest in the conquest is found excluded. If a minor has such a privilege, as to what has been proponed and repelled, that after the time fixed by the practice of the court for complaining of interlocutors, he may still apply for a review thereof, the respondents do not perceive how the extract of the decret can exclude him therefrom; such privilege they apprehend must continue during the course of the long prescription; and what the consequence of that may be to the strength and validity of judicial proceedings, is humbly submitted to your Lordships.

WITH regard to the point itself, how far Mrs. *Marjory Sinclair*’s interest in the conquest is precluded, upon the supposal, that

that the present application made by the petitioner is competent ; the respondents humbly answer to the first argument endeavoured to be maintained, touching the father's power of exclusion, by which, as has been already said, the respondents presume the petitioner's meaning to be, that the father, could not, by his own act alone, exclude his daughter from her share of the conquest, without exerting his power of division in the precise terms expressed in the contract. The respondents have no occasion to dispute that point. It is sufficient for them to say, that *Marjory* stands excluded not by the act of her father alone, but by her own act, or the joint act of both. She was by her father and mother's contract of marriage, a creditor in a share of the conquest, in the event of her surviving her father. He has contracted with her a certain sum during his own life, as her share of this conquest ;—she is a party to this contract.—The sum contracted upon her account, has been, agreeable to that contract, paid to her father-in-law, who, in consideration thereof, and of the marriage then agreed upon, became bound to perform the several obligations expressed in that contract. This then falls to be considered not as the act of the father alone, exerting his power of division of this conquest, but as the act of the daughter, or the joint act of both, whereby the father contracts a certain sum upon her account, as her share of the conquest, and she accepts that sum as such, or, which is the same thing, she accepts the provisions conceived in her favours, which provisions were made, in consideration of the tocher therein contracted. And, in fact, upon the death of Mr. *John Dunbar*, Mrs. *Marjory's* first husband, Sir *Patrick Dunbar* repaid the 10,000 merks to her and *Harpdale*, her second husband, upon her renouncing the life-rent right provided to her in her first marriage contract.

THE respondents shall suppose, that Mrs. *Marjory Sinclair* had, by a deed merely gratuitous, but not alledged to have been brought about by any undue influence or wrong means, discharged her father of this claim of conquest ; or that upon a stranger's paying her a valuable consideration, she had discharged her father of any such claim : In neither of these cases is there a power of division exerted by the father, but still Mrs. *Marjory* must stand excluded by her own deed ; and, in the present case, allowing no proper division of the conquest to be made betwixt
th-

the daughters : Mrs. *Marjory's* right is cut off, not by the act alone of the father, but by the joint act of both father and daughter, or more properly, by the act of the daughter alone, whereby she, by being a party to that contract of marriage, by which the 10,000 merks was contracted on her account, as her share of the conquest, must necessarily be understood to have accepted the same, or the provisions made by that contract in her favours, as her share of, and in full of the conquest.

It is another question, What the effect of this acceptance by Mrs. *Marjory* of the 10,000 merks, as her share of the conquest will have? whether the whole of the conquest, deducting that 10,000 merks, will belong to Mrs. *Katharine Sinclair*, the other sister, or only the half thereof, the other half being considered as discharged by Mrs. *Marjory*? But that question, which will fall to be determined by your Lordships, upon advising a petition by Mrs. *Katharine Sinclair*, likewise reclaiming against the interlocutor of the 26th of *July* last, with the answers thereto, has no connection with the present, which only is, How far Mrs. *Marjory* herself stood excluded by the contract of marriage above mentioned, entered into by her with her first husband in the year 1748?

It is likewise another question, If that contract of marriage had the effect to exclude Mrs. *Marjory*?—That shall be afterwards considered.—The only point so far as concerns the present argument being, whether or not, it was in *Southair's* power to exclude his daughter *Marjory* from her share of the conquest, without a formal exerting of his power of division? What the respondents maintain at present is, that he and his daughter together, could, by their joint act, effectually extinguish her claim to any share of the conquest, not upon the footing of a division of the conquest, but upon that of a contract betwixt debtor and creditor, whereby the one gave a valuable consideration, and the other accepted the same in satisfaction of a debt.

THE respondents can by no means admit what the petitioners have endeavoured to maintain, “ That if there was in this case no
 “ division made, the inevitable consequence must be, that the conquest
 “ subjects are at this day liable to be taken up by both the daughters of
 “ the second marriage.” For what they contend upon this head,
 and

and with some degree of confidence, is, that Mrs. *Marjory's* interest in the conquest being discharged, which could very well be done, without any division made by the father, her claim has to all intents and purposes become extinguished, whatever the effect of that extinction may be with regard to Mrs. *Katharine* the other sister, which does not enter into the present argument.

THE respondents do not perceive, how the petitioners plea can in any degree be supported by what they mention of the children of the second marriage being, upon *Southdun's* death, served heirs of provision in special, in the whole conquest subjects without opposition, and thereupon infest therein. For that service is manifestly absurd and inept, so far as concerns the property of those subjects, the rights whereof were taken to *Southdun* and his heirs whatsoever: And considering it as a general service, in order to establish the *jus crediti* of the conquest in the persons of the children of that marriage, as heirs of provision to their father upon his death; the effect of such service never can be, to debar the respondents, or any others having interest, from pleading, that that *jus crediti*, with regard to both the heirs served, or one or other of them, was renounced and discharged.

THE respondents own they do not conceive the import of the petitioners argument, where they endeavour to maintain, that if *Southdun* himself had appeared to oppose his daughter *Marjory*, in serving herself to the subjects as heir of provision under the marriage contract 1722, he could not have insisted, that her claim was barred by her own contract in the year 1748; and that if, upon her being actually served, he had brought an action against her, for compelling her to denude, or account upon the contract 1748, he could not have prevailed therein. As upon the first of these suppositions, the very appearance of *Southdun*, to whom no person could be heir of provision in his own lifetime, would, by itself, have barred the service; so that the effect of the contract 1748, could not then be considered; and if it could have been considered, he undoubtedly might have pled, that Mrs. *Marjory's* claim was discharged. And upon the second supposition, no action could possibly lye against the heirs served to denude, or to account for the value of the subjects whereto they were served, as the service of heir to a person alive was manifestly void, and could carry right to no subject whatever.

The petitioners suppose, that *Marjory Sinclair's* marriage contract with her first husband, cannot operate a discharge of her claim of conquest, unless it be understood, that *Southdun* made a purchase from his daughter of her right, which they say appears absurd. The respondents can by no means admit the justness of that argument; for they humbly contend, that without supposing any purchase made by *Southdun* of his daughter's right, her being a party to the contract of marriage 1748, operated an effectual liberation to him from all claim of conquest competent to her upon her father and mother's contract of marriage.

WITH regard to the *second* point insisted on by the petitioners, "*That Southdun never intended to give the transaction here made, the effect of excluding Mrs. Marjory Sinclair.*" The respondents humbly hope, that there is nothing in the circumstances set forth in the petition, that has any tendency to show, that *Southdun* had any intention contrary to the express words of the contract of marriage 1748, whereby the 10,000 merks was contracted with his daughter, *as her share of the conquest*: That sum, it is very true, is given her in name of tocher; but it is equally true, that it is given her as her share of the conquest, which fell very properly under the name of tocher, as all provisions whatever, made by the father in favours of the daughter, fall naturally under that denomination. It might as well be maintained, that when a father contracts a sum in name of tocher with his daughter, and as the provisions made to her in her mother's contract of marriage, she can still claim the provisions contained in that contract, in so far as these exceed the particular sum provided in her own contract of marriage; as that in the present case, notwithstanding of the words in the marriage contract 1748, *Mrs. Marjory Sinclair* still retained an interest in the conquest, to a share whereof she was provided in the contract 1722.

THE respondents cannot conceive it is of any weight, that *Mrs. Marjory Sinclair* did not, in this case, grant any express renunciation or discharge of her claim of conquest. In their apprehension, the 10,000 merks having been given by the father, as her share of the conquest, in a contract of marriage, to which she was a party, and wherein such ample provisions appear to have been made to her and the heirs of the marriage on consideration of that tocher, must import as effectual a discharge of her claim of conquest,

quest, as any superfluity and redundancy of stile could possibly do. It may be true, that a legitim is not understood to be renounced but when expressed; but the respondents know no instance where a legitim has been found due, where a sum was given and received in name of legitim. In the several decisions quoted by the petitioners, there were particular provisions made, but without any mention that these provisions were given as legitim, which is quite different from the present case, where the 10,000 merks was given by *Southdun* to his daughter *Marjory*, as her share of the conquest; neither do the other decisions quoted by the petitioners, apply; as, in those cases, there was no particular claim discharged, as that of conquest was in the present; and particularly that of the 4th of *February* 1726, *Gibson* against *Marjoribanks*, there was no mention made in the discharge of the claim of conquest.

THE respondents know no rule established, either by law or practice, whereby it is necessary in a marriage contract, or any other deed, to use the words *discharges*, or *accepts in full*: They apprehend, when a sum is given in name of a particular claim, the receiving that sum, imports a discharge of that claim, and must have as strong an effect, as the most express words can have; and that, therefore, in the present case, this 10,000 merks being contracted by *Southdun*, in his daughter's contract of marriage, as her share of the conquest, and actually paid by him in terms of that contract, he must, in the nature of the thing, without the aid of *discharge*, or other words of stile, be effectually liberated from the share of the conquest contracted to that daughter, who was herself one of the principal parties to that contract.

THE respondents cannot conceive how it can avail the petitioners, that this contract of marriage 1748, was entered into before the dissolution of *Southdun's* second marriage: They rather apprehend, that this circumstance preponderates in their favours, as it was certainly more rational for Mrs. *Marjory Sinclair* to accept of a reasonable sum in satisfaction of her claim of conquest, at a time when the extent of it did not appear, when she was but an eventual creditor, and might have predeceased her father; and when, for what she knew, the whole might be exhausted in his lifetime by onerous debts, rather than to take her hazard of all these chances, in hopes that the share to which she would be entitled, would, at the long run, amount to a greater sum.

At the same time, the respondents are far from admitting the fact to be, that the conquest amounts near so high as the petitioners suppose. The respondents have all along averred, and they believe in the end it will appear to be truth, that the 10,000 merks contracted with Mrs. *Marjory Sinclair* in the year 1748, with the additional bond of provision of 8000 merks, was a full and adequate value to any interest in the conquest she should have pretended to, if these provisions had not been made by her father in her favour.

For your Lordships will please remember, that by the contract 1722, no particular estate or subject is provided to the children, but the free balance that *Southdun* should be worth at the dissolution of the marriage, (exclusive of his then land estate) after deducing all debts then contracted, or to be contracted; therefore, every shilling of debt due by *Southdun* in August 1755, when his second wife died, must be deducted from the acquired subjects, and the balance only can be claimed as falling under conquest: It is the state of *Southdun's* affairs at that period that must determine this claim; and your Lordships will find from the summons at Mr. *Sinclair* of *Duran's* instance, who is trustee for the petitioners interest in the conquest, that he claims relief of fundry debts, due by *Southdun*, at his death, amounting to no less than 6000 *L. Sterling* of principal sums; which, with the annual rent then resting, was nothing short of 7000 *L. Sterling*, whereas the value of the subjects claimed as falling under conquest, is only 5,481 *L. 13 s. 10 d.* consisting of the following particulars:

	£.	s.	d.
1. A wadset right on the lands of <i>Lathronachet</i> , redeemable for — — — —	1,111	2	2 ¹ / ₂
2. A wadset over the lands of <i>Cannichy</i> , redeemable for — — — —	372	11	8
3. Some old houses in <i>Thurfs</i> , purchased by <i>Southdun</i> in 1745 for — — — —	222	4	5
4. The lands of <i>Northdun</i> , purchased in November 1751, four years before the dissolution of the second marriage, for which <i>Southdun</i> paid — — — — —	3,777	15	6 ¹ / ₂
	<hr/>		
	5,481	13	10 ¹ / ₂

WITH

WITH respect to the above subjects, the respondent must observe, that the two wadset rights, and old houses in *Thurso*, cannot possibly rise in their value: And how the lands of *Northun*, without any melioration, should, in so short a time, rise to near double the value, as the petitioners are pleased to suppose, is not easily conceived, especially when there is neither mines, mansion-house, nor one single tree on the estate in that part of the country; but the whole of the above subjects rated at the very prices which *Southdun* paid for them, together with his executry and personal estate, the produce whereof may be seen from Mr. *Sinclair* of *Harpisdale* the executor's accounts lying in court, and every other fund or subject belonging to him at his death in 1760, (exclusive of the land estate he had at the date of the contract 1722, which he settled upon the respondent) will hardly be sufficient to pay these debts in the trustee's summons of relief, much less to pay them, and 1444 *l.* 8 *s.* 10 $\frac{8}{12}$ *Sterling*, contained in the bonds of provision which he intended for the children of his second marriage, over and above the 10,000 merks formerly paid to Mrs. *Marjory*; whereby it must appear to your Lordships an exceeding rational act of administration in *Southdun*, to settle certain provisions upon the daughters of that marriage, in satisfaction and full implement of what they were entitled to by the clause of conquest, in order to save them from any questions with his other heirs concerning the extent of that conquest, which now is the subject of so much litigation, and what generally occurs in every question concerning conquest. It was to avoid litigation, and the trouble and expence of ascertaining the extent of the conquest, that the respondents insisted to have it found, that the ladies had accepted the provisions made by their father, and discharged the claim of conquest.

THE respondents cannot discover how *Southdun's* intention with regard to his daughter *Marjory's* discharge of her claim of conquest by the contract of marriage 1748, does any way appear from the additional bond of provision in the year 1757, granted by him to her, and *Harpisdale* her second husband, and the heirs betwixt them; and supposing, but not admitting, that when he contracted the 10,000 merks of tocher with his daughter, he intended to give her more, if there were no heirs male of the marriage; yet as the 10,000 merks is contracted simply as her share of the conquest, whether there were any heirs male of the marriage or not, it must have the effect in both events of operating a

discharge to him of her share of the conquest. Though that bond bears, that the sum of 8000 merks therein contained, with the sum of 10,000 merks formerly paid, were granted in full satisfaction to her of the provision of conquest conceived in her favours: it does not follow, that *that* provision of conquest was not formerly discharged, especially, as the additional bond bears these sums to be in satisfaction, not only of her claim of conquest, but in general of her share of the provisions contained in her father and mother's contract of marriage, and in full satisfaction of her legitim or other pretensions whatsoever, which she, as one of the children of that marriage, could claim or pretend right to, by, or through her father or mother's death; which discharge, with regard to the subjects comprehended under it, is much more ample, than that implied in the contract of marriage 1748, which relates in particular to the conquest: And though that bond contains an exception from the clause in satisfaction "of his own good will alienarly, and his daughter's succession to his estate, if the same should fall to her by right of blood, or any settlement made, or to be made by him;" it is impossible, that under this exception can be comprehended Mrs. *Margery*'s claim of conquest, in place whereof, not only the tocher was given in the year 1748, but also, in satisfaction whereof, the said tocher, and the 800 merks contained in this bond, are expressly said to have been given.

It appears to the respondent, that it makes no difference, that according to the words of the contract 1748, Mrs. *Margery* does not accept this 10,000 merks from her father which was taken payable to Sir *Patrick Dunbar*; as her being a party to the contract, whereby Sir *Patrick Dunbar* makes very ample provisions in favours of her, her future husband, and the children of the marriage, in consideration of that marriage then agreed on, and of the tocher thereby stipulated, must of necessity import her approbation of that contract in the several articles thereof.

AND, with regard to the last argument insisted on by the petitioners, "*That if such was Southalun's intention, it could not be effectual*:" The respondent cannot lie the best grounds to maintain that doctrine, unless it could be made appear, that this transaction was fraudulently brought about, and such circumstances of

of fraud condescended upon, as would be relevant to reduce the same upon that ground. which is so far from being the case, that fraud is not so much as alledged, nor is there the least appearance thereof. The daughters of the second marriage were heirs of provision to their father in this conquest in case they survived him: The extent of that conquest was wholly uncertain during the subsistence of the second marriage; even after the dissolution thereof it was subject to the onerous, and even rational deeds of the father, whereby it might have been greatly diminished, and even totally exhausted. The daughters had no claim during the father's lifetime; he, together with his wife their mother, had a power of division thereof amongst their children: One of these children in her marriage contract, which is amongst the most solemn of all deeds, receives as her share of the conquest a rational sum, or, which is the same thing, such sum is contracted for her in name of tocher, and *as her share of the conquest*. Her mother's nephew is the bridegroom, and the writer of his own contract; his father *Sir Patrick Dunbar* was reputed to be the greatest lawyer in that part of the country, and had the chief direction of *Southdun*; the tocher is made payable to *Sir Patrick* in consideration of the provisions made upon his part. The contract of marriage between *Southdun* and his lady, was in the hands of her brother *Sir Patrick Dunbar*, who had best access to know what was rational and just for *Southdun* to give, and for his niece and *Mr. Dunbar* his son to accept of as her share of the conquest. And it is not disputed, that if he, by a regular deed with consent of his wife, had allocated this 10,000 merks to *Mrs. Marjory*, and the remainder of the conquest to *Mrs. Katharine*, *Mrs. Marjory* would have been effectually excluded. How then she or the petitioners in her right can quarrel her deed, in consequence whereof this sum has been contracted with her and paid, upon the head of fraud or any other ground whatever, the respondents own is altogether incomprehensible by them.

THAT part of the civil law, whereby a father could not contract with a child *in familia*, has nothing to do with this case; that was the effect of the *patria potestas*, by which, according to the principles of the ancient civil law, a son *in familia* was *eadem persona* with his father, could make no acquisition to himself, but entirely to the father; so that a father's contracting with his son,

was in effect contracting with himself, which was absurd. When these principles of the old civil law came in later ages to be relaxed, and that sons in family could acquire property to themselves, such as the *castrense quasi castrense*, and even *adventitium peculium*, contracts betwixt fathers and sons, when the sons came to be of age, were equally binding as contracts with strangers; and the influence that a father was presumed to have over a son in *familia*, had not the effect of rendering such contracts void.

NEITHER does the case of transactions made *contra fidem talularum nuptialium* at all apply to the present: Marriage contracts are *uberrime fidei*, and every latent deed executed at the time of such contracts, in the least derogatory to what is therein contained, is deservedly looked upon as fraudulent, and proceeding from undue influence upon persons in these particular circumstances; whereas the deed quarrelled here is no latent deed, but a solemn contract of marriage, executed at the sight, and by the direction of Sir Patrick Dunbar the father of the bridegroom, the uncle of the bride, and the chief director of *Southden*, which removes every suspicion of any thing wrong or fraudulent having been done or intended.

THE respondents do not dispute, that by the *Roman law pactum de hereditate erentis* was generally reprobated; but this was never received in the law of this country, it having been the inveterate practice here, that even the right of legitime may be discharged by a child during his father's life, and that likewise a clause of conquest may, if such discharge be otherwise liable to no objection.

WHEREAS the petitioners contend, " That in this case *Southden's* heirs of line can never claim more than he himself could have done, and that he would not have been heard to plead that he was intitled to hold all Mrs. *Major's* share, as he has in effect declared that share to have been only 10,000 merks, and that such a plea must appear extremely unfavourable in many cases, as particularly, supposing there to have been nine or ten children alive in the 1746, who all died, except one, before the dissolution of that marriage, and that the conquest appeared very far to exceed this 10,000 merks." All the respondent shall say is, that supposing there were *termini lubiles* of a question of this kind

Kind occurring with a father himself, as there are not, because the right only falls to the child on the father's death. *Southdun* might very well maintain, that it was no part of the transaction with his daughter *Marjory*, to estimate her share of the conquest at 10,000 merks; that as she had received that sum, or that the same had been contracted in her name as her share of the conquest, she could now claim no further interest therein, unless she could condescend upon circumstances of fraud relevant to reduce that transaction: Neither would it make any difference that if there had been many children besides *Marjory* existing in the 1748, and that they all besides her died before the dissolution of the second marriage, or before the father's death, as it was altogether a chance bargain the father made; at the same time, that supposed case is widely different from the present. Further, if the father had immediately died, the conquest would have divided amongst ten or eleven persons; whereas, in the event that happened, it would have fallen wholly to one, supposing the transaction with that one never to take place: But, in the present case, that very share of the conquest which would have fallen to *Marjory*, and no greater share, fell to her when her father died: That share must have been in her view when she made the transaction; whereas, in the supposed case, it could not well be in view, that nine or ten children would all die before their father.

BUT further, to reverse the case put by the petitioners, let this case be put,—That a provision is made by a father to nine or ten children suited unto his circumstances at the time, or the acquisitions of the marriage, which shall be supposed at 9000 or 10,000 *l.* and that he pays down 1000 *l.* to one of them, as his or her share of the conquest; that by misfortunes, cautionry, or other cross accidents, he loses the whole or greatest part of his remaining stock, and that he leaves nine children with little or no provision;—the respondents would be glad to know where the remedy would lie in this case; or if the father of the family could recal or draw back from this child, who had actually received and accepted of a certain provision, any part of it, so as to do justice to the rest, or to preserve an equality in the distribution.

In short, no transaction can happen, or provision be made for one child of a family, but a person of fancy and ingenuity may figure cases where hardships and inequality may arise from it: But the question before your Lordships comes shortly to this; If *Southam* has not all along acted the part of an honest man, and an affectionate parent, doing his utmost, by fair play and candid dealing, to prevent the bad consequences of litigation and disputes among his descendants; and if all these transactions were not made at the sight, and with the concurrence of Sir *Patrick Dunbar*, uncle to the children of the second marriage, and Sir *Patrick's* son and *Harpshale*, both husbands to Mrs. *Marjory*.

THE other case put by the petitioners, that a creditor in a bond of 5000 *l. Sterling*, should, without looking into the bond, accept of 10,000 merks, and grant a discharge of that sum as the sum contained in the bond, is not at all similar to the present; for there the discharge appears to proceed upon an absolute mistake; whereas here there is a fair transaction executed betwixt the parties, whereby a certain sum is instantly told down and accepted of, in place of an illiquid eventual claim, subject to a variety of chances.

In respect whereof, &c.

DAVID GRENE.

The Lords advised

Katherine Sinclair, *and* James Sinclair of
 ran, *Esq*; *her* Trustee; Henrietta,
 Emilia, *and* Margaret Sinclair, *Infants*
 James Sinclair of Harpsdale, *their*
and Administrator in Law, -

David Threipland Sinclair, *Esq*; *an*
and Stewart Threipland, *Esq*; *his*
and Administrator in Law, -

Et è contra,

The Appellants C A

IN 1714, Mr. *David Sinclair* of *Southdun* married Lady *Janet Sinclair*
 by whose Relations he was persuaded, in 1716, to execute a Deed,
 of *Southdun*, but also other Lands of considerable Value that had beq
 and all that he should conquest and acquire during the Marriage,
 Heirs Male or Female of the Marriage in Fee; and in case he died with
 the Estate to go to her.

that Marriage. Lady *Janet* died in 1720, leaving Issue one Son and three Daught
 Daughter died Infants; and of the two Survivors. *Jane* and *Janet*. *Jan*
 1716. By the first Marriage Settlement, *David Sinclair* became bound to secure,

I
one
figu
But
If
and
can
dis
not
tar
tric; and
f Du-
Janet,
Appellants.
Father

of
of
con
ther
flak
the
cept
riet
nfant,
Father
Respondents.

S E.

or, Sister to the Earl of *Caithness*,
settling not only his paternal Estate
in purchased for him in his Minority,
upon Lady *Janet* for Life, and the
out that, during her Life, the Fee of

re, of whom the Son and the eldest
was the, married Sir *William Douglas*, and in part paid *any*

Action brought
Appellant James
in Trust for
Appellants.

of Reduction,
ought by the Re-
David Threip-
clair, for setting
Appellants
s.

disputed before
Ordinary.

February 1767.
Ordinary of the Lord
y appealed from
Parties.

entation preferred
Ordinary for
Sinclair's Chil-

other Appellant *James Sinclair of Duran*, in Trust, for their own Use under the Marriage Articles of 1722; and he, as their Trustee, brought against all the Heirs and Representatives of *David Sinclair*, in whatever so far as not chargeable on the Conquest Lands, settled upon the Appellants. But the Respondent *David Threipland*, not satisfied with the opportunity involved upon him in Exclusion of the Appellants, who were equally with to the Deceased, brought an Action of Reduction and Declarator, for *Katherine* as Heirs of Conquest and Provision to their Father, and for all Conquest made for them was totally and effectually discharged and extirpated. Heir taking *David Sinclair's* Conquest Subjects, and his other Heirs, showed him against all *David Sinclair's* Debts remaining due at his Death.

These Actions coming on before the Lord Ordinary, the Points disputed by her Marriage Contract in 1748, effectually released all Claim of Conquest under the Marriage Articles? 2dly, Whether, by the Bond of Provision to *Katherine* also was not discharged? And, 3dly, Supposing *Marjory* to be barred, whether *Marjory's* Exclusion intitled *Katherine* to the Father and Mother's Marriage Articles, with Allowance of the 10,000 Merks, whether the Benefit of *Marjory's* Release and Satisfaction operated in favour of or Assignment of her Share of the Provision?

The Lord Ordinary, 11th February 1767, pronounced the following:
“ the Debate, with the several Writings therein referred to, finds, That
“ the Pursuer's Cedents, having been the only Children of the Marriage
“ and *Marjory Dunbar*, were intitled to full Implement of the Provision
“ Terms of the Marriage Articles between their Parents, viz. 10,000 Merks
“ quest during the Marriage, the Conquest being declared to be what should
“ at the Dissolution of it, over and above the Land Estate he was then
“ Debts as was then owing, or should be owing at the Dissolution of the
“ these Daughters was intitled to the aforesaid Provision, in respect thereof
“ tract of Marriage, had the Power of Division; and therefore finds, That
“ Contract of Marriage, he settled 10,000 Merks upon her, as her Share
“ to cut out *Marjory* and her Heirs, who behaved to rest satisfied with the
“ bound to make good the Provisions to the other Heir of the Marriage, and
“ not exhausted them.”

The Appellants *Hemrietta, Janet, Emilia* and *Margaret*, the surviving Heirs of *Marjory*, (their Brother *George* being dead) preferred a Representation to the Interlocutor, declaring, That their Mother's Marriage Contract was effectually

I
one
fig
But
If
and
can
dis
not
far
true
The
of
of
con
the
flak
the

; all their Right, Interest and Demand
ought an Action in the Court of Session
Character, for Relief as to the Deeds,
pellants by their Father's Marriage. At
least Part of *David Sinclair's* Estate, de-
him Heirs Portioners (or Co-jarconers)
setting aside the Service of *Marjory* and
having it declared, that the Provision of
inghilled; and that, at all Events, the
ould be liable to relieve and indemnify

the
cept
riet

ated were, 1st, Whether *Marjory* had,
Conquest under her Father and Mother's
in 1716, her Claim of Conquest
of all farther Claim of Conquest, and
the whole Provision contained in their
Merks advanced to *Marjory*? Or
our of the Father, by way of Discharge

g Interlocutor: "Having considered
at Mrs. *Marjory* and *Katherine Sinclair*,
age between *David Sinclair* of *Southton*
is to the Children of that Marriage, in
Merks, and the whole that should be con-
sidered (i. e. *David Sinclair*) should leave
possessed of, and after Payment of all
the Marriage; but finds, That neither of
Father, by the Conception of the Con-
That though in his Daughter *Marjory's*
e of the Conquest, which was effectual
the Division he made, he still continued
therein, so far as *Marjory's* Share had

Children and Representatives of *Mar-*
Lord Ordinary against that Part of his
Final to cut off her Claim to her Father's

ment could not have been so. The Contract contained no such Father had it by Law inherent in him ; but the Court, instead of contrary Ground, and founded its Judgment upon a Principle in the Appellants argued, That this Case was no Authority against, of Equality amongst the Children, the Judgment was proper in the renouncing Children ; so upon the *Datum* of a Power of Div Share, the Judgment would have been against any such Advantage and therefore whatever might be the Effect of *Marjory's* Acceptance of the Conquest, no Benefit could thence accrue to the Father. In the late Decisions, the Father has an inherent Power of distributing Proportions as he thinks fit, even where no such Power is given upon as conclusive against his Pretence of Right to the Share of (mentioned) yet at the Time of the Case of *Allardice*, it was so found by the greatest Authorities appear to have entertained the contrary. The Infant Appellants, that their Mother *Marjory's* Marriage Article could, by Law, exclude her from her farther Share of the Conquest intended as a Satisfaction of every Claim of the Child's, when in Scotland, the Practice in Scotland is to insert in such Marriage Articles, excluding the Child in direct Terms from every possible being the Law and Practice, the Omission of such express agreement, must not only operate favourably for her in Point of Law in her, the Words, in *Name of Tocher and Share of Conquest*, in confirmation of her Claim : And that it was so meant by *David Sinclair* subsequent Bond of Provision to his other Daughter, the Appellant inserted, declaring it to be in full Satisfaction of her *Portion ne Legitim, or other Pretensions whatsoever* ; so that *Marjory's* Right of 10,000 Merks given the Children by the Marriage Articles, remains she had actually received.

26th July 1768.
Interlocutor of the
Lords of Session ap-
pealed from by the Ap-
pellants Katherine
Sinclair, &c.

The Court, after much Debate and Difference of Opinion, 21
locutor : “ Find that the Words of *Marjory Sinclair's* Contract of
“ Discharge of the Half of the Conquest provided to her by her
“ consequently must restrict her Sister *Katherine's* Share of said
“ the Heirs of Line of *Soubdun* to that Share of the Conquest
“ *Marjory*, if she had not been excluded by her Contract of Ma

The Appellant *James Sinclair*, Father of the other Appellant
claimed against this Interlocutor for their Interest, as did the o-
her's ; the former insisting that *Marjory*, and these Appellants in

one
fig
Hu
If
and
carf

Power, and therefore the Son argued, That the
not allowing that Proposition, proceeded on the
consistent with the Power of Division. Hence
but rather for them, since as upon the *Inter-
ine*; favour of the Father's Right to the Shares of
Division, which excludes any Right to Equality of
of Age to the Father, entitled with that Power;
of the Sum advanced to her as to any farther
con her. They farther insisted, That however, by
ther the Marriage Contract Provisions in such
flak him by the Marriage Articles which they relied
the a renouncing Child, for the Reasons above-
cept from being taken for settled Law, that some
rict any Opinion. Lastly, it was argued for the
neither induced an Intent of excluding, nor
quest: Wherever an Advancement on Marriage
her of Legitim, Bairn's Part, or Contract Pro-
settlement, the most express and comprehensive
e Claim either of Law or Contract; and this
eral Renunciation in *Mary's* Marriage Settle-
, but proves that there was no Intent of exclu-
poring only that it was meant in Part Satisfac-
himself, appears from the Frame of the sub-
Katherine, wherein the most express Words are
heral, Bairn's Part of Gear, Share of Money,
ht to her Share of the Conquest, and of the
ained in full Force, after giving Credit for what

With July 1768, pronounced the following Inter-
f Marriage in 1748, import a Renunciation and
er Father's Contract of Marriage in 1722, and
Conquest to the other Half; and therefore preters
now in Question, which would have fallen to
rriage, and decern."

nts, *Henrietta, Janet, Emilia* and *Margaret*, re-
ther Appellant *Katherine*, and her Trustee, for
her Right, were not excluded by her Marriage

I
one
fig
De
If
and
car
dis
not
tar
tru;

of
of
con
the
flak
the
cep
riet

Q

1
2
3
4

5

James Sinclair of Duran, Trustee for
rine Sinclair, and Henrietta, Janet,
and Margaret Sinclairs, Infants,
Father James Sinclair of Harpsdale,

David Threipland Sinclair, an Infant
Father Stuart Threipland, -

Et è contra,

The CASE of the Respondent and of the Appellant in the

DAVID SINCLAIR of Southdun was three Times married, and 1

In 1714, he married Lady Janet Sinclair, Daughter of the Earl
Daughter of Sir Robert Dunbar of Northfield—And, in 1755, he
ray of Claridon.

By his first Wife he had two Daughters: Jean, the eldest, married Sir Wil-
now extinct.—Janet, the second, married Dr. Threipland in 1753, and di-
the Respondent, and a Daughter, since dead without Issue. By his second W-
Marjory, the eldest, Mother of Henritta, Janet, Amelia, and Margaret Sincl-
are the Appellants. In 1760 he died, leaving the third Wife, and one Daugh-

These Marriages gave Rise to three several Marriage Settlements.

By the first Marriage Settlement, David Sinclair became bound to secure,

Katha-
Amelia,
by their } Appellants.

t, by his } Respondent.

ent in the Original,
: Cross Appeal.

st Issue by each of his Wives.

of *Catherine*—In 1792, he married *Mary*,
married *Mary*, Daughter of *James* *Mas-*

son *Daniel* in 1746, and she and her Issue are
died in 1755, leaving *Daniel* *Thomas* and *Stephen*
died, who died in 1788, he had two Daughters:
died, who, and *Katherine* the second Daughter,
ter by her, *Margaret*.

*The following is a copy of the Original and
Cross Appeals, now affirmed*

owing at the Dissolution of the Marriage; but finds, That neither of them, in respect the Father, by the Conception of the Contract, had the though in his Daughter *Marjory's* Contract of Marriage he settled 10,000 which was effectual to cut out *Marjory* and her Heirs, who behaved continued bound to make good the Provisions to the other Heir of the Mat Share had not exhausted them; and, before Answer to the Question, her Share of the Provisions, appoints her to make distinct and pointed sentants (present Respondents) contained on a Paper apart, and to submit as soon as may be."

10 March 1767. The Appellants, *Henrietta, Jean, Amelia, and Margaret Sinclairs*, present of the Interlocutor which finds, that the Release in *Marjory's* Contract of the Respondent having put in his Answer to this Representation, the Lord Ordinary

The Respondent likewise represented, and prayed the Lord Ordinary to have, by her own Contract of Marriage, discharged and released her Interlocutor's Claim could not extend beyond the Half of the Conquest.

The Appellants put in their Answer; and with it the Answers by *Katharine's* Condescendence; on which the Lord Ordinary pronounced the confirmation of the Representation for *David Threipland* and his Administration to the former Interlocutor, so far as it finds the Sums advanced to claiming effectual Implement of the Obligation for Conquest, in so far considered the Condescendence for the Defenders, and Mrs. *Katharine Sinclair* considered, that it is an agreed Fact, that Mrs. *Katharine Sinclair*, at the Family with her Father; that there is no Deed under her Hand renouncing; that it is not alleged that she, after her Father's Death, ever Father's Life made any Claim upon it; finds, That she is not bound to Pursuer's in her Right to the Conquest, in Terms of her Father and Mother

24 June 1767. The Respondent presented a Representation to the Lord Ordinary, compelling Interlocutor was pronounced:—" Having considered this Representation the Interlocutor, and therefore adheres thereto, and refuses the Desire of

8 July 1767. The Respondent gave in a reclaiming Petition to the whole Lords, in which

1760. That from the Appellant *Katharine's* Answers to the Questions put and either admitted or not denied by her, it was evident that she had acknowledged by her, by her Father, and by her nearest Relations, who managed granted in Satisfaction of all *Katharine* could claim under her Mother's Mat prior to *David Sinclair's* postnuptial Contract of Marriage with his third Wife Claims of the Daughters of this second Marriage, and thereby have it in part of his third Marriage. Sir *Patrick Dunbar*, *Katharine's* Uncle, a Man of at the Time possessed of a Counterpart of her Mother's Contract of Marriage negotiated the Transaction for her; and he and *James Sinclair of Duran*, her partner, are signing Witnesses to the Bond; and it is believed that on *David's* delivered up to him the Counterpart of his Marriage Settlement with the whole Covenants in the same to be sufficiently implemented and discharged

these Daughters was entitled to the said Power of Disposal. And therefore in the said 20 Marks upon her as his Share of the Conquest, so rest satisfied with the Decision, he made, by his Counsel, to Mrs. *Marjory*, to her and *Mrs. Marjory* how far Mrs. *Katharine* was cut out from claiming Answers to the Questions put to her by the Defendant, her Answers; and return them to the Proceed

terred a Representation, complaining of that Part Marriage was effectual to cut off her Claim; and Ordinary adhered to that Part of the Interlocutor.

after his Interlocutor, and to find, That *Mrs. Marjory* rest in the Conquest, the other Daughter *Katharine*

the Sinclair to the Questions put to her by the Respondent Interlocutor: Having returned the Counsel-in-Law, with the foregoing Answers, telling Mrs. *Marjory* do not produce Mrs. *Katharine* as not implemented. — And further having considered her Answers; and more particularly having in mind of the alleged Transaction, was lying in using her Claim on her Mother's Contract of Marriage made any Claim upon this Bond, or even in her acceptance of that Bond, and that her Claim, and her Contract of Marriage, remains effectual.

daining of this Interlocutor; whereupon the Defendant, filed so sufficient Cause therein for allowing the Representation.

which he argued and insisted,

to her, and from such and Circumstances stated, of the Bond for 1000 *l.* and that it was understood the Transaction on her Part, that the Bond was Marriage Contract — The Bond is dated two Days after, when he meant to relieve his real Estate of the said Power to settle the same upon the Heirs Male of his Line, and Knowledge of the Law, and who was age, on which she founds her present Claim, maternal Trustee, and in law to Sir *Patrick Dunlop Sinclair*'s granting this Bond, Sir *Patrick Dunlop*

Time; the Right or Claim of Legitim has no Existence till the Father's Death upon the Father, but as a Provision of Law arising on his Death: If before discharged or renounced his Share of the Legitim, the Effect thereof is to hold the other Children as if he had never existed, and the Father acquires nothing Child cannot convey to, or discharge the Father of, a Right or Claim of Right or Claim of Legitim commences at the Father's Death only, and when it does commence, then each Child effectually can discharge or renounce or others, as was solemnly determined in the Case of *Claud Henderson's* Child of Marriage, was extremely different; it was a true and proper Debt, due by Covenant, and consequently if any of the Children discharged the Father of his Share as would eventually have fallen to that Child: That the Appellants having a Discharge to the Father, and yet they argued inconsistently, that such Father, who was the real Debtor and Party discharged, but must have the Father no Party to the Transaction: That the Appellants had also admitted, that the Provision of Conquest, would operate a total Release to the Father; but one of the Creditors, could release the Share falling to or belonging to such Child the Children might validly assign their Share to the Father, or even to a third Party that the Discharge of a Child could extinguish the Claim of Debt as to that Child: That if a Provision of Conquest can be totally released by all the Children, it is for ever bars the Child granting such Discharge, that a Discharge granted by one release the Father of such Child's Share or Proportion of the Conquest.

2do. That *David Sinclair*, by giving to his Daughter *Marjory* 10,000 *Merks* in Provision of the Conquest between his two Daughters, as it was clear from the Evidence that he was tied up from making such a Division by himself. By that Contract the Children of the Marriage, is to be divided among them "by their Father's Disposition or Division by two of the nearest of Kin on the Father's Side," further specified, that the Conquest also provided to the Children, "was to be divided among them as the Father should think fit." *Marjory's* Mother was alive in 1748, when she was married, and it could not be said that *Marjory* was bound to her Father, in her Contract of Marriage, meant to exercise his Power without the Concurrence of his Wife; but he was not barred from purchasing his Share in which he was Debtor to his Daughter. That the Interlocutor of the Father's having the Power of Division, and was given as his Reason for not being "tied bound to make good the Provisions to the other Heir of the Marriage," "had not exhausted them;" but when the Fact as to the Father's Powers was established, the Judgment.

3tio. That the Appellant had endeavoured to establish two Distinctions the first of which was not true in Fact, and the other was fallacious in point of Law, understood to be Law, long prior to the Determination in the Case of *Allan* in that Appeal, proceeded upon that Ground: "In his Answer to the Appeal, he had the Power of Division." It is immaterial to the Point at Issue, whether the Power of Division is prior or subsequent to the Death of the Mother, his Power of Division is not barred by the Children are as much Creditors in their respective Shares before her Death as the Debtor from his Obligation.

After the Memorials were given in, the Court desirous to have the full

established by the Judgment in the Case of *Allard* in February 1721, that it would be indecent to enter a Judgment on behalf of the Appellant *Katharine*.—It is said, “ Daughters having accepted of Provisions in their Marriages, could fall to them by their Mother’s Contract, whether they be the first or the last Child of the first Marriage, as two of three Children of the first Marriage, as the Provision received did not accresce to the Son of the first Marriage.” Upon the Foundation of this Judgment, the Parties may have been settled, in Terms thereof, to receive what Injustice would be done, and what it should be found, in that Judgment, it should be found in this Case, that the Contracts of Marriage, in Satisfaction of what would be found, as the Appellant *Katharine* accepted of less than would have fallen to them, and that the Children does accresce to the remaining Child, an

Objection.

It is said, 1st, That the Extent of the Provision to the Children, was doubtful at the Time of the Judgment, and, 2^{dly}, That at the Time of the Judgment the Mother was dead; whereas, in the Case made when the Mother was alive.

Answer.

It is answered to the first, That it appears from the Case of *Allard*, that each Party arguing the Conquest among his Children, by the Appellants, is not true, and could not be the general Point of Law in that Case; and that the Transactions between Fathers and Children, from the Dissolution of the Marriage, are, from the Moment of their Existence, by their Father’s Marriage Settlement, may discharge or convey their respective Shares. The Mother is nowise requisite, nor would the Marriage subsist, the Share of the Children, the Number of Children may encrease, and contracted by the Father; but it was never maintained in any Case, that the Contract of the Conquest until their Mother’s Death, when the Children are married, or for ordinary Doctrine to maintain, that a Provision to a Child, in lieu of her estate, not be at Liberty to accept of such Provision, when the Mother was alive, when it is admitted, that the Mother is dead.

The Respondents, upon the 15th January 1770, entered their Appeal to the Lord Ordinary of the 11th February and 10 March, and also from the Intest of all in the Year 1767; in so far as they find it not instructed, That *Katharine* granted by her Father to her in the Year 1756, and therefore, that the Intest of her Claim to Conquest under her Mother’s Contract of Marriage.

advice, affirmed upon an Appeal to this House into any further Discussion of the other Arguments was in that Case expressly found, "That the two Contracts of Marriage, in Satisfaction of all that rich Provisions being less than would have fallen to the said Marriage, the Surplus of the two Thirds more than the said Marriage, but was at the Father's free Disposal of the Rights and Interests of many hundred Families during these fifty Years past. It is impossible to suppose that the Children cannot accept of Provisions in their Father's Disposal, should fall to them by their Mother's Contract; or it is not to be contended, That where any of the Children have accepted of the Surplus of what would have belonged to such Child is not at the Father's Disposal.

The Father's Power of dividing the Conquest among his Children is the Judgment in the Case of *Alford* was given; and the Transaction with the younger Children in that Case, and the present Case, the Transaction with *Mary* was

drawn from the Cases given in at hearing the Appeal is founded upon the Father's unlimited Power of disposing of his Estate as a Point undisputed.—The Fact therefore, as stated, would have had no Influence in the Determination of the Case, and, 2^{do}. It can make no Difference, whether the Children relative to the Conquest, are prior or posterior to the Conquest. The first is an incontestable Proposition, that the Children are entitled to a Share of the Conquest provided they are of lawful Age.—It is admitted, that when of lawful Age, they are entitled to a Share of the Conquest.—The Consent of the Children is of no Effect to invalidate their Acts.—While the Conquest is indeed more precarious, because the whole of the Conquest is subject to the Debts of the Father, which was maintained in the Case of *Alford*; nor was it until the Children were not at Liberty to dispose of their Share of the Conquest.—In fact, it is done almost on every Occasion, and is well established.—It would be a new and very extraordinary Principle, if a Father should not be at Liberty to give a suitable Provision to his Children, or that the Child should be bound to maintain and discharge her Father, so long as the Mother is alive, and this may be lawfully and effectually done when the Child is of lawful Age.

And to your Lordships from the two Interlocutors of the Court of Session, the whole Lords of the 4th December, 1791, in the Case of *Mary Sinclair* did accept of the Bond of Provision, and the Mother is not bound to accept of the same in full Satisfaction of the Conquest.

N^o 5th November 17, 1767.

Unto the Right Honourable the Lords of Council and Session, Commissioners for Plantation of Kirks and Valuation of Tiends,

T H E
P E T I T I O N
O F

GEORGE BAILLIE of *Leys*,

Humbly sheweth,

THAT the Lands of *Gallantuir*, and eighteenth Part and an Half above the Hill, commonly called *the Millfield*, belonged in Property to *James Dunbar* of *Dalcrofs*.

That *Alexander Dunbar* of *Barmuckaty* having mortified the Sum of 2000 Merks *Scots*, for the Use and Behoof of eight poor, weak, and old Persons within the Burgh of *Inverness*, and to be under the Management of the Ministers and Kirk-session thereof, the foresaid *James Dunbar* of *Dalcrofs*, who, after *Barmuckaty*'s Death, became liable for the Payment of the aforesaid Sum, executed a Deed of this Date, proceeding upon the Narrative of the foresaid Mortification, by which he bound and obliged him, his Heirs, &c. to content and pay to the Members of the Kirk-session therein named, and their Successors in Place and Office for the Time, as Patrons, Trustees, and Administrators, for the Use and Behoof of the said eight poor old and weak Persons above mentioned, the said Sum of 2000 Merks, and that at any Term of *Whitsunday* and *Martinmas*, at which it shall be found, by the said Mini-

April 27,
1703.

A

ster

ster and Elders for the Time being, or major Part of them, that the said Sum shall be got conveniently bestowed on Land, in Heritage or Wadset, conform to the foresaid Mortification, with 400 Merks of Penalty in case of Failzie, with the ordinary Annualrent of the said principal Sum, during the Not-payment, &c.

The said *James Dunbar* did further, by this Deed, bind and oblige him, his Heirs, &c. to infest and seale the Patrons, Trustees, and Administrators foresaid, and their respective Successors in Place and Office, for the Use and Behoof of eight poor indigent Persons above specified, heritably, under the Reversion underwritten, in the Lands and others underwritten, all lying within the Territory and Parish of *Inverness*, viz. in all and haill his eighteenth Part and an Half eighteenth Part arable Field-land above the Hill, commonly called *the Millfield*, bounded in Manner therein mentioned. *Item*, in all and haill his arable Field-land and others, commonly called *the Gallamuir*, &c. *Item*, in all and haill his four Acres of arable Field-land, of and in the Field called *the Dempster*, &c. with the *Tiends* of the haill and several Lands above written; and that in real Warrantice and special Security to the said Patrons, Trustees, and Administrators, for the foresaid Use and Behoof, for and anent the Payment to them of the said principal Sum of 2000 Merks, and Penalty when incurred, and the Annualrents of the principal Sum, to be distribute and applied as said is, with the Charges of the Infestment to follow hereupon, and such other Sums as shall be disbursed in Relation to the Premises.

By this Deed he grants Procuratory for resigning the Lands;
 " Likeas I hereby resign, surrender, and overgive, all and
 " haill my Lands and others above and after specified, viz.
 " my said eighteenth Part and an Half eighteenth Part of
 " arable Field-land above the Hill, commonly called *the*
 " *Millfield*. *Item*, my said arable Field-lands and others, com-
 " monly

" monly called *the Gallamuir*, with my said four Acres of
 " arable Field-land, of and in the foresaid Field called *the*
 " *Dempster*, with the said *Tiends* of the haill and several
 " Lands above written, and haill Houfes, Biggings, Yards,
 " Liberties, Privileges, and Pertinents belonging thereto,
 " lying, denominate, and bounded *ut supra*, together with
 " all Right, Title, Interest, and Claim of Right, which I
 " or my forefaids had, have, or anyways may have or pre-
 " tend thereto, or any Part thereof, or any Annualrents or
 " yearly Duties upliftable forth of the famen in Time com-
 " ing, during the Not-redemption under written, in the
 " Hands of the present Provost, Baillies, and remanent Town-
 " counsellors of the said Burgh of *Inverness*, representing the
 " Body and Community of the Burgh, or their Successors in
 " Place and Office, my immediate lawful Superiors thereof,
 " in favours and for new Infeftment of the same, to be made
 " and granted in due and competent Form, to the said Mr.
 " *Hector Mackenzie*, Minister foresaid, &c."

This Deed contains an Affignation to the haill Mails and
 Duties of both Lands, and *Tiends* during the Not-redemp-
 tion; and it contains a Clause of Redemption in the follow-
 ing Words: " Redeemable always, and under Reversion, the
 " said Lands, *Tiends*, and others above expreffed, by me or
 " my forefaids, from the said Patrons, Trustees, and Admi-
 " nistrators, in Name of the said eight poor, weak, indigent
 " Persons, be Payment making to them, for their said Be-
 " hoof, of the said principal Sum of 2000 Merks, Money
 " foresaid, and what of the Annualrents thereof shall hap-
 " pen to remain in the Hands of me and my above written,
 " and bees resting by us for the Time, with the Penalty above
 " mentioned, if incurred, and Expences of the foresaid In-
 " feftment, and other Disbursements above specified, if they
 " shall happen to expend the same, in our Defaults, accord-
 " ing to their Account of the same in Honesty and Credit,
 " haill and together in one Sum, at any Term of *Whit-*
 " *sunday*

“ *sunday* or *Martinmas* in Time coming, on due and lawful
 “ Premonition of sixty Days, of before, to be made be us to
 “ them personally, or at their Dwelling-places for that Effect,
 “ in Presence of a Notar and Witnesses, as effeirs; upon Pay-
 “ ment whereof, or due and lawful Consignation of the same
 “ in the Hands of the Provost, or any one of the Baillies of
 “ *Inverness*, most responfal, for the Time, Premonition being
 “ always made as above, the Lands, *Tiends*, and others a-
 “ bove written, shall be holden and repute duly and lawfully
 “ redeemed in all Time thereafter.”

27 April,
1705.

In virtue of the foresaid Procuratory, the Kirk-session obtained a Charter of Resignation of the foresaid Lands and *Tiends* from the Magistrates and Town-council of *Inverness*, in virtue of which, they were infeft, of this Date.

From the above Recital, your Lordships will observe, that the Right which *Dalacrofs* granted of the foresaid Lands and *Tiends*, in favours of the Kirk-session, is precisely of the Nature of an improper Wadset; and the Kirk-session having, in virtue of the foresaid Titles, assumed the Possession of the Subjects, recently after the Date of their Right, they continued in the full Possession thereof, without any Interruption, from that Period, till lately, that they denuded themselves of their Right, in favours of the Petitioner, who had Right by Progress to the Reversion from the foresaid *James Dunbar*, the Granter of the Wadset.

That there was no Attempt to augment the Stipend of the Parish of *Inverness*, from the 1665, till within these few Years, that a Process for that Purpose was brought, at the Instance of the then Incumbents, in the Course of which Process, a Locality was made up in the Year 1760, wherein the following Article is stated in the Locality of the Stipend of the second Minister: “ *It. m.* out of the *Tiends* of the Lands,
 “ called *Gallamuir*, or *Millfield*, the Lands of *Broadstone*
 “ *Ares*, and Acre above the Hill, called *Craterstone*, and
 “ Half a Cobre-fishing, belonging to the Hospital of *Inver-*
 “ *ness*,

"*nefs*, of old Stipend, 18*l.* 8*s.* 4*d.* and two Bolls one Fir-
 "lot Victual, and of Augmentation, 11*l.* 8*s.* 4*d.*"

This Procefs was allowed to lie over and sleep, and there-
 after wakened at the Instance of *Alexander Frafer* of *Culdu-*
thill, an Heritor in the aforesaid Parish, who had neglected
 formerly to produce his Rights; and several other Heritors
 having likewise produced Rights to their Tithes, this occa-
 sioned a new Scheme of Locality to be made out.

In this new Scheme there was localled upon the Lands of
Gallamuir and *Millfield*, belonging to the Heirs of *John Bail-*
lie, Writer to the Signet, formerly wadset to the Hospital of
Inverness, 13*l.* 6*s.* 2*d.* *Scots* of Augmentation, and to the
 second Minister, out of the Tiends of the Lands of *Galla-*
muir or *Millfield*, and a half Coble-fishing, formerly wadset
 to the Hospital of *Inverness*, belonging to the Heirs of Mr.
John Baillie, of old Stipend, 16*l.* 15*s.* 3*d.* of Money, and
 one Boll one Firlot of Victual.

All Parties having been allowed to see and object, it was
 objected in behalf of the Petitioner to the foresaid Scheme of
 Locality, that the old Stipend, therein stated for the Lands
 of *Gallamuir* and *Millfield*, exceeded what was charged upon
 these Lands by the old Decreet of Modification and Locality
 in the 1665, in one Firlot and one Peck of Victual, and two
 Shillings *Scots* of Money: And it was further objected, that
 no Part of the augmented Stipend could be laid upon the Pe-
 titioner's Lands, as long as there were any Free-tiends within
 the Parish, because he had an heritable Right to the Tiends
 of the foresaid Lands; and the Lord *Kennet*, Ordinary, up-
 on advising the Objections, with Answers and Replies, of
 this Date pronounced the following Interlocutor: "The ¹⁰ July,
 "Lord Ordinary, having considered these Objections, with ^{1767.}
 "the Answers thereto, and Replies, sustains the first Obje-
 "ction, and repels the second Objection, and ordains the
 "Locality to be rectified accordingly;" and, upon advising

5 August,
1707.

a Representation and Answers, his Lordship, of this Date, was pleased to adhere.

The Petitioner humbly begs leave to submit the foresaid Interlocutor to your Lordships Review. It is not alledged, that there is not Sufficiency of Free-tiends within the Parish, to answer the whole augmented Stipend; and, that being the Case, the Petitioner humbly apprehends, that no Part of it can be laid upon his Lands.

Your Lordships will observe, that the Lands of *Gallamuir* or *Mullfield*, with the Tiends thereof, were wadsetted by *James Dunbar* of *Dalcrofs*, as far back as the 1703, to the Kirk-session of *Inverness*, who, in the same Year, obtained a Charter of Resignation of both Lands and Tiends, and were infeft, and they continued in the uninterrupted Possession of both Lands and Tiends, without any Demand having been made upon them by any Person claiming a Right to these Tiends, down to the present Process of Locality; and that being the Case, it is humbly submitted, if these Lands can be burdened with any Part of the augmented Stipend, as an heritable Right to the Tiends thereof has been established by the positive Prescription.

The Petitioner has Reason to believe, that the Right to the Tiends was in *Dalcrofs* the Granter of the Wadset, even at the Date of the Wadset; but it is unnecessary to enter into that Question, because, after Possession was had by the Kirk-session, in virtue of a Charter and Seafine, for above the Space of 40 Years, without any Interruption, it supercedes the Necessity of enquiring into the Nature of the original Right, the same being secured by the positive Prescription.

The Answer that was made on the other Side resolves into this: That there are not here *termini habiles* for Prescription: That there was no Title in the Person of the Granter of the Wadset, upon which Prescription could run in his favours: That the Right granted in favours of the Kirk-session was only

only an Incumbrance: That Possession upon that Title by no Length of Time could establish a Right of Property ; but that the Incumbrance, upon being discharged and renounced, would be effectually extinguished.

But, with Submission, these Observations afford no solid Objection to the Petitioner's Plea. He humbly apprehends that the Charter and Seafine in favours of the Kirk-session is a proper Title of Prescription, not only in favours of themselves, but likewise in favours of the Granter of the Wadset. The Possession of the Wadsetter, with respect to every third Party, is, in the Eye of Law, the Possession of the Reverser, and the Right established in favours of the Wadsetter by such Possession, must, upon Redemption, accrue to the Reverser.

When a Person grants a Wadset of Lands that does not belong to him, and the Wadsetter takes Infeftment, and continues in Possession, without any Challenge, for the Space of forty Years ; the Right of every third Party would thereby be effectually cut off by Prescription. After forty Years Possession, in virtue of Charter and Seafine, without any Challenge, the Wadsetter could not be disturbed from the supposed Want of Right in the Person of his Author.

This clearly holds in the Case of irredeemable Rights ; and, with Submission, it can make no Difference that a Right of Reversion is stipulated in favours of the Granter, because a Person possessed of a redeemable Right is, to all Intents and Purposes, Proprietor in a Question with every other Person than the Reverser ; and his Possession will secure the Right by Prescription against all third Parties, as much as if the Title of his Possession had been that of an absolute Right of Property.

And if the Prescription would be available to secure the Right of the Wadsetter against every Challenge by third Parties during the Not-redemption ; so, upon Redemption, the Right acquired by the Possession of the Wadsetter will
accresce

accesse to the Reverser. The Possession of the Wadfetter is in the Eye of Law held to be the Possession of the Reverser, in every Question with third Parties claiming a Right to the Subject, and will be considered in the same Light as if the Reverser had himself possessed for the Space of forty Years upon a habile Title of Property.

The Wadfetter possesses the Subject, not only for himself, but for the Reverser. The Charter and Seafine expedite in his Person is a sufficient Title for securing by Prescription, not only his own Interest, but likewise the Interest of every third Party with which his Right is burdened. After Redemption the Wadfetter may be considered as Author to the Reverser, who, in a Question with every third Party, would be intitled to found upon the Charter and Seafine that was expedite in the person of the Wadfetter, as a proper Title of Prescription.

That this would hold in the Case of a proper Wadfet cannot well be doubted.—Where a proper Wadfet is granted to be holden, as in this Case, of the Granter's Superior, when a Charter and Seafine is expedite in the Person of the Wadfetter, the Granter is denuded of the Property; he has no more remaining with him than a personal Right of Reversion, and upon Redemption, he behoved to be re-invested by a Disposition from the Wadfetter. So that, in the most proper Sense, the Wadfetter becomes the Reverser's Author, and the Reverser, in a Question with third Parties, is certainly intitled to found upon the Title that was expedite in the Person of the Wadfetter, and also upon the Possession that followed in virtue of it.

Now, although in a Question betwixt the Reverser and the Wadfetter, there may be a great Difference betwixt a proper and an improper Wadfet, yet the Petitioner is humbly advised, that in a Question with third Parties, there is no material Difference.—The Wadfetter, until he is denuded in favours of the Reverser, is in a Question with third Parties, to be held as Proprietor, as much as in the Case of a proper Wadfet

Wadset.—It is not competent for a third Party to found upon the Right of the Reverser, or to alledge that his Wadset is extinguished by his Intromissions, the Reverser could allow the Wadsetter to continue the Possession as long as he thought proper; and the Wadsetter, after having possessed both Lands and Tiends for above the Space of forty Years, in virtue of a Charter and Seafine, containing a Right to both Lands and Tiends, could not thereafter, during his Possession, be made liable in Payment of any Tiend to the Titular.—In like Manner, the Reverser might discharge the Reversion altogether, in which Case, the Property of both Lands and Tiends would for ever remain with the Wadsetter. And, if it is thus in the Power of the Reverser to deprive the Titular of the Possession of the Tiends as long as he pleases, it is, with Submission, not easy to conceive, how the Titular should be in a better Situation, by the Reverser's exercising his Right of Redemption, than the Titular would have been, if the Reverser had allowed the Wadsetter to continue in the Possession of the Subject.—It is inconsistent with the Idea of a Right, to suppose it to depend entirely upon the Will of a third Party.

From the Premises, it is, with Submission, plain, that the Lands in question cannot be burdened with any Part of the augmented Stipend, as long as there are other free Tiends within the Parish, the Tiends having been effectually consolidated with the Stock by the positive Prescription.—The Kirk-session, by their Possession for above the Space of forty Years, upon a Charter and Seafine, had an unquestionable Right to these Tiends, which could not be challenged by any Person whatever; and, upon Redemption, the full Right that was in the Wadsetter, must accresce to the Reverser.

It was said upon the other Side, that the Kirk-session had not the uninterrupted Possession of these Tiends during the Years of Prescription, for that there were Augmentations

given to the Ministers from time to time, and no Right of Exemption pleaded for these Tiends.

But, in the *first place*, the Petitioner does deny, that any Augmentation was given out of these Tiends, during the whole Period of the Kirk-session's Possession. Their Right commenced only in the 1703, and there was no Augmentation of Stipend in this Parish, from the 1667, till the present Action was brought, long before which Time Prescription was run. And, *2do*, It would not hurt the Petitioner's Plea, although an Augmentation had been given out of these Tiends during the Currency of the Prescription.—Ministers Stipends are a natural Burden upon Tiends, whether they belong to the Titular, or be consolidated with the Stock, and belong to the Heritor; and it could never hinder the Heritor from establishing his Right by Prescription against the Titular, that the Heritor, from not attending that there were other free Tiends within the Parish, had allowed Part of the Minister's Stipend to be laid upon the Tiends of his Lands.

May it therefore please your Lordships, to alter the foresaid Interlocutors of the Lord Ordinary, and to find, that the Petitioner has an heritable Right to the Tiends of the foresaid Lands, and that therefore no Part of the augmented Stipend can be laid upon these Lands, as long as there is any free Tiends within the Parish.

According to Justice, &c.

R O. M A C Q U E E N.

December 19. 1767.

[TEIND CAUSE.]

A N S W E R S

F O R

ALEXANDER FRASER of *Culduthill* and
others, Heritors of the Parish of *In-*
verness;

T O T H E

PETITION of GEORGE BAILLIE of *Leys*.

THE ministers of *Inverness* having brought a process of augmentation, modification and locality in this court several years ago, in the course thereof, an *interim* scheme of locality was made up as far back as the year 1760; and in this locality a part of the augmentation was laid on the teinds of the petitioner's lands of *Gallowmuir* and *Milnfield*.

A rectified scheme having since been made out, Mr. *Baillie's* lands were again burdened with his share of the locality, without any complaint on his part, till after a variety of proceedings, and that the locality was prepared and approved of by the Lord *Kennet* Ordinary; and when it was ready to be reported to your Lordships, Mr. *Baillie* was pleased at that last stage of the cause, to enter an objection
in

in a representation against the Lord Ordinary's interlocutor approving of the locality, insisting, that he had an eritable right to his teinds, and that no part of the augmentation should be laid on him, for the reasons which are at full length stated to your Lordships in his petition.

Altho' the locality has depended very long, that Mr. Baillie appeared in it from the beginning, and gave particular attention to the proceedings, and repeated advertisements were made to the several heritors in the news papers to produce their rights; and that the diets assigned for that purpose had been long expired, besides a good deal of time afterwards taken up in determining the validity of their rights: notwithstanding objections were made by other heritors to the scheme of the locality, which were severally discussed, and some rectifications made in consequence thereof: Yet every question of that kind was finally determined, and the locality prepared and approved of by the Lord Ordinary, in terms of the rectified scheme, before this objection was stirred on the part of Mr. Baillie: and after it was moved, the greatest part of one session was exhausted, in demanding diligence to recover the writings now founded on, which diligence was never extracted, as the writings were in his own hands, and since produced by him. By these means he has hung up the locality, in which upwards of 50 small heritors are concerned, now for three sessions, on account of this trifling article of augmentation.

The Lord Kennet Ordinary repelled this objection offered by Mr. Baillie to the locality; and upon advising a representation and answers, adhered to his interlocutor. Mr. Baillie has reclaimed to your Lordships, and the following answers are humbly submitted.

It will be observed, that Mr. Baillie has produced none of his title-deeds, to show that either he, or any of his predecessors or ancestors, had a right of any kind to the teinds of these lands: from whence the respondents are entitled to presume, that he can show no such right: For

it is not to be supposed, that he would have kept up his title-deeds, had they given him a right both to stock and teind; and therefore, in the sequel of the argument, the respondents must take it for granted, that *James Dunbar of Dalcrofs*, who was author to the petitioner's father, was, upon the face of his title-deeds, proprietor only of the lands, and not of the teinds, and that he conveyed the same right which he himself had, to Mr. *Baillie*.

But the petitioner, though he can shew no heritable right to his teinds on the face of his title-deeds, has taken up a very extraordinary conceit, *viz.* that because his father's author Mr. *Dunbar*, in granting an heritable bond to the kirk-session of *Inverness* in 1703, did, by some mistake, give an obligation to infest in the teinds as well as the lands, though he had no right to the teinds. This obligation, together with the infestment following on it, must be considered by your Lordships as a good prescriptive title; and though the debt is now paid, and the security extinguished by a discharge and renunciation, yet as the kirk-session is said to have had possession of the rents, stock and teind for forty years, this possession, founded on the heritable bond, must be held as vesting a complete heritable right, by virtue of the positive prescription.

The petitioner, in the course of his argument, affects to call this heritable bond a wadset: He admits, that it is not a proper wadset; but he says, that it was *of the nature of an improper wadset*; and that as the wadsetter was intitled to make his right better by prescription, so he, as coming in place of the wadsetter, is intitled to avail himself of any plea that the wadsetter could have used.

The petitioner may give the security what name he pleases, but from the tenor of it, as set forth by himself, it is clear, that it was no *disposition*, either to stock or teind, but merely a *security* given for payment of a debt; and indeed was neither more nor less than what is commonly known by the name of an heritable bond. It appears from the narrative of this bond, that the money which was the subject of the security, having been mortgaged to
the

the hospital of *Levening*, under the administration of the kirk-session, and being already in the hands of the said *James Dunbar* of *Dalrofs*, as debtor in the sum, and it being reasonable that the payment of it should be *effectually secured*, therefore the said *James Dunbar* " bound
" and obliged himself, his heirs, successors, and executors
" whatsoever, conjunctly and severally, to *content and*
" *pay* to the said kirk-session, &c. all and hail the foresaid
" sum of 2000 merks, and that at any term of *Whitsunday* or
" *Martinnas* in time coming; at which, it shall be found
" be the saids minister or ministers, and elders for the time
" being, or major part of them, myself or my said repre-
" sentative, being always one of the number *ut supra*,
" that the said sum shall be got conveniently bestowed
" on land in heritage or wadset, conform to the foresaid
" mortification, without longer delay, with the sum of
" 400 merks money above written, as liquidate expences,
" in case of failzie." Likeas, he binds and obliges him-
self, to pay the due and ordinary annualrent of the said
principal sum, yearly and termly during the not pay-
ment.

" And, to the effect the said patrons, trustees, and ad-
" ministrators, for the use and behoof above specified, *be*
" *further secured* anent the premisses, I, the said *James*
" *Dunbar*, as heritable proprietor of the lands and others
" underwritten, with the pertinents, without prejudice or de-
" rogation to the contents aforesaid of the said mortification,
" and what has followed or may follow thereupon, or to the
" said personal obligation, and what may follow on the
" same; bot, in further corroboration thereof, *accumulandis*
" *jura jurius*, be thir presents, bind and oblige me, my
" heirs and successors, with all convenient diligence,
" and on our own expences, duly and sufficiently *to insert*
" *and seize*, be the resignation underwritten, the patrons,
" trustees, and administrators foresaid, and their respec-
" tive successors in place and office, for the use and behoof
" of

“ of the eight poor indigent persons above specified, heritably under the reversion underwritten, in my lands and others underwritten, all lying within the territory and parish of *Inverness*, viz. In all and haill my lands and others of *Gallowmuir*, &c. with the teinds, and that in real warrandice and special security to the saids patrons, trustees, and administrators for the foresaid use and behoof, for and anent the payment to them, in the cases and circumstances, and with and under the provisions and conditions above express, of the said principal sum of 2000 merks, and penalty above written, of 400 merks money foresaid, when incurred, and the annualrents of the principal sums aforesaid.”

Then follows a procuratory of resignation in common form, for new infeftment to the ministers and session, &c. heritably, in real warrandice and special security to them for the said use and behoof, for and anent the payment of the said principal sum, penalty, annualrents, and others above narrated, *redeemable* always, &c.”

In virtue of this procuratory, the kirk-session was infeft upon a charter of resignation from the magistrates and council of *Inverness*, proceeding on the foresaid heritable bond, and bearing expressly to be in *securitatem et warrantizationem* of the mortified sum. April 17.
1703.

Such being the fact, the respondents do, in the first place, with submission, deny, that it was in the power of the administrators of this hospital, by any length of time, to acquire a right of property in the teinds in question, as they had no title in them upon which they could acquire such right. They had no *disposition* to the teinds, but merely an heritable bond, by virtue of which, as creditors of Mr. *Dunbar*, they could take possession of his rents, if he did not pay the annualrents. Their infeftment gave them only a security or incumbrance; and by no length of time could

B.

they

they ever convert this into an heritable right of property, either in the lands or the teinds.

The act 1617, introducing the positive prescription, says, "That whosoever have bruiked by themselves, their tenants, and others, having their rights, their lands, baronies, annualrents, and other heritages, by virtue of their *heritable investments* made to them by his Majesty, or others their superiors and authors, for the space of 40 years continually and together, following and ensuing the date of their said investments, and that peaceably without any lawful interruption during the said space of 40 years: That such persons, their heirs, &c. shall never be troubled, pursued, nor inquieted in the *heritable right and property* of their said lands and heritages, &c. providing they be able to show and produce a charter of the said lands and others to them or their predecessors, by their said superiors and authors, preceeding the entry of the said 40 years possession, with the instrument of sasine thereon."—Now, it is, with submission, incomprehensible how this statute can apply to the case of Mr. Bailie, who shows no charter or sasine in the person, either of him, or of any of his predecessors or authors, bestowing upon him the heritable right of property of these teinds, but merely a charter and investment in the person of a creditor of his author, proceeding on the narrative of an heritable bond and procuratory of resignation therein contained, resigning the lands and teinds for new investment to the said creditor, in warrandice and security of a sum of money, and which security is now entirely at an end, and extinguished by payment of the money.

Supposing the security were still subsisting, it would make no difference: For it is a mistake to say, that the administrators of the hospital, by being invest, and in possession upon this heritable bond, could ever acquire a right of *property* in the teinds by prescription; for this would be

prescribing

prescribing a right contrary to their own title, whereby they had merely a right of security or warrandice in the subject, which never could be made broader by possession for any length of time: Neither could they subsume in terms of the act of parliament, that they were *heritably interest* in the teinds, and that they were safe from being disquieted in the *heritable right and property* of their said lands and heritages.

2do, Even if it could be supposed that the administrators of the hospital had a right in them, which could be rendered more firm by the positive prescription, yet this would in no shape avail the petitioner. The hospital's right is now entirely extinguished, and the discharge or renunciation granted by the hospital cannot have the effect to vest any right in the proprietor of the lands which he had not *ab ante*. The only consequence of paying the debt, and getting a discharge of the heritable bond, was, that the proprietor came to possess his own rents in place of allowing them to be possessed by a creditor. But his right of property did not become broader than it was formerly; he continued all along *infeft*, and in the eye of law proprietor of the lands, though he was for some years kept out of possession by virtue of the incumbrance; and when the incumbrance was purged, he re-assumed the possession in his own right; not as a singular successor, or as having acquired any new right from another person, but by virtue of his property in the lands, which had all along remained with him.

The petitioner has been pleased to argue upon the supposition of a reconveyance from the kirk session, such as happens in the case of a proper wadset holding of the superior. The respondent has no reason to inquire what may be the law in such a case. It is enough to say, that no such thing occurs in the present instance: There was no reconveyance from the hospital to Mr. *Baillie*, nor any occasion for a reconveyance;

all

all that happened, was, that upon payment of the debt, the security was renounced, and any right which the hospital had, whether by the express tenor of the bond, or by prescription, became from that moment extinguished. If, therefore, Mr. *Dunbar*, or his successor Mr. *Baillie*, had no original right to these teinds, they certainly acquired none by paying off the heritable debt, and purging the incumbrance on the lands.

The petitioner stands in his own right as proprietor, and not in the right of the hospital; and it is in vain to say, that the hospital's possession was the same with the proprietor's, or that Mr. *Baillie* is intitled to found on it in a question with third parties, as much as if he himself had possessed. There is no doubt, that a man may found on the possession of his tenants, wadsetters, annualrenters or others, possessing under him, in order to compleat the positive prescription; but then he must shew an original title in himself, or his predecessors and authors, upon which the possession has commenced, otherways, the possession is without a title, and cannot be the foundation of prescription. In the present case, Mr. *Baillie* does not pretend to shew any title whatever in himself, or his predecessors or authors, but founds merely on a right which he himself, or which is the same thing, his author gave, by mistake, to a third party, with whom he does not in any shape connect, and which right is now totally extinguished.

For these reasons, it is hoped your Lordships will have no difficulty of refusing this petition, and of adhering to the interlocutors of the Lord Ordinary: And it is also hoped, that you will find Mr. *Baillie* liable for the expence incurred by the other heritors in this litigation, very improperly maintained by him, especially after the cause had depended so long without his stating the objection.

In respect whereof, &c.

WILLIAM CAMPBELL

JULY 26, 1768.

[TIEND CAUSE.]

MEMORIAL

FOR

GEORGE BAILLIE of LEYS;

AGAINST

ALEXANDER FRASER of *Culduthill*, and others, Heritors of the Parish of *Inverness*.

THE Stipend of the Ministers of *Inverness* was modified by a Decreet of Modification and Locality in 1665. From that Time no Attempt was made to augment the Stipend of that Parish, till within these few Years, that a Process for that Purpose was brought, at the Instance of the then Incumbents. To this Process the whole Heritors within the Parish were made Parties, and, amongst the rest, the Governors of the Hospital of *Inverness*, and the deceased Mr. *John Baillie*, Writer to the Signet, the Memorialist's Father; and after the Heritors had severally deponed upon the Rent of the Subjects belonging to them respectively, a Locality was made up, wherein the following Article was stated, in the Scheme of the Stipend of the second Minister: "*Item*, out of the Tiends of the Lands "*called Gallamuir, or Millfield, the Lands of Broadstone Acres, and Acre above the Hill, called Craterstone, and*

A

" Half

“ Half a Coble-fishing belonging to the Hospital of *Inverness*,
 “ of old Stipend, 18 *l.* 8 *s.* 4 *d.* and two Bolls one Firlot Vic-
 “ tual, and of Augmentation, 11 *l.* 8 *s.* 4 *d.*” And the Memorialist's Father was also stated in that Locality for the Stipend of the Lands belonging to him.

This Process was thereafter allowed to lie over and sleep, and was afterwards wakened at the Instance of *Alexander Fraser* of *Culluthull*, an Heritor in the aforesaid Parish, who had neglected formerly to produce his Rights: and several other Heritors having likewise produced Rights to their Tithes, this occasioned a new Scheme of Locality to be made out.

At this Period the Memorialist had entered into a Transaction with the Governors of the Hospital of *Inverness*, for purchasing their Rights to the foresaid Lands of *Gallamuir*, or *Millfield*, and Half Coble-fishing. From this Circumstance, Occasion, it seems, was taken, in the new Scheme of Locality, that was afterwards given in, to state these Lands and Fishing, in two Articles, in the following Manner, *viz.* to the first Minister, “ Out of the Tiends of the Lands of *Gallamuir* or *Millfield*, belonging to the Heirs of *John Baillie*, “ Writer to the Signet, formerly wadset to the Hospital of *Inverness*, 13 *l.* 6 *s.* 2 *d.* *Sets* of Augmentation.” And to the second Minister, “ Out of the Tiends of the Lands of *Gallamuir* “ or *Millfield*, and a Half Coble-fishing, formerly wadset to the “ Hospital of *Inverness*, belonging to the Heirs of Mr. *John Baillie*, of old Stipend, 16 *l.* 15 *s.* 3 *d.* of Money, and one “ Boll one Firlot of Victual.”

The Moment this new or rectified Scheme of Locality made its Appearance in Process, it was objected, on behalf of the Memorialist, that the old Stipend, therein stated for the Lands of *Gallamuir* or *Millfield*, exceeded what was charged upon these Lands by the old Decree of Modification and Locality in the 1665, in one Firlot and one Peck of Victual, and two Shillings *Sets* of Money: And it was further objected, that no Part of the augmented Stipend could be laid upon these
 Lands,

Lands, as long as there were any Free-tiends within the Parish, because he had an heritable Right to the Tiends of the foresaid Lands; and the Lord *Kennet*, Ordinary, upon advising the Objections, with Answers and Replies, of this Date, pronounced the following Interlocutor: "The ^{July 10,} Lord Ordinary, having considered these Objections, with ^{1767.} the Answers thereto, and Replies, sustains the first Objection, and repels the second Objection, and ordains the Locality to be rectified accordingly;" and, upon advising a Representation and Answers, his Lordship, of this Date, ^{August 5,} was pleased to adhere. ^{1767.}

The Memorialist having reclaimed against the foresaid Interlocutor, in so far as it repelled the second Objection, the Lords, upon advising the Reclaiming Petition and Answers, pronounced the following Interlocutor: "The Lords having ^{March 2d,} again heard this Petition, with the Answers, they remit ^{1768.} to the Lord *Kennet* Ordinary, to appoint Memorials to be given in upon such Parts of the Cause as he shall think proper, and that betwixt and the first Sederunt-day of *June* next."

Accordingly, Lord *Kennet*, of this Date, "ordained Me- ^{March 4,} morials upon the whole Cause, to be given in to the Lord ^{1768.} Ordinary, on or before the 14th Day of *June* next."

This, therefore, is humbly offered on the Part of *George Baillie of Leys*.

And, to support the Memorialist's Objection, it will only ^{Memorialist's Argument.} be necessary to state the Titles on which he founds his Right to his Tiends.

By a Charter, of this Date, proceeding on the Resignation ^{April 27,} of *James Dunbar of Dalcross*, the Provost and Magistrates of ^{1703.} *Inverness*, Superiors of the Lands therein mentioned, disposed, confirmed, and made over, to and in favour of Mr. *Hector Mackenzie*, Minister of *Inverness*, and others, Members of of the Kirk-session there, as Patrons and Trustees for the Use and Behoof of eight poor, old, weak and indigent Persons,

all

all and haill the Lands therein and above mentioned, “ cum
 “ *decimis omnium dictarum terrarum, etc. quæ quidem ter-*
 “ *ræ arabiles, aliaque præscripta, cum decimis, et pertinen-*
 “ *per-prius hereditarie pertinuerunt ad Jacobum Dunbar de*
 “ *Dalerois.*”

April 27, 1703. On this Charter Infeftment, also produced, followed.

Feb. 14, 1711. And the faids Trustees did further, of this Date, obtain a
 Decreet of Adjudication againft the faid *James Dunbar of*
Dalerois, therein designed heritable Proprietor of the Lands,
 Tenements, and others under written, with the Pertinents,
 by which the foresaid Lands, called the *Millfield or Gallamuir*. Half-coble Salmon-fifhing on the Water of *Nefs*, and
 others, with the *Tiends* of the faid Lands, and other Subjects
 therein mentioned, were adjudged from the faid *James Dun-*
bar, and decerned and declared to pertain and belong to the
 faid Trustees, and their Successors in Office, for the Use and
 behoof above written, heritably, in Payment and Satisfaction
 of the Sums therein mentioned.

The Trustees were directly admitted into the full and exclu-
 sive Possession of the Subjects, at and from the Date of their
 Right. This Fact was never disputed on the Part of the He-
 ritors, till they gave in their Memorial to be advised herewith,
 in which, for the first Time, they alledge, that the Time when
 the Trustees entered into Possession, does not certainly appear,
 for that Allowance is given in the Decreet of Adjudication,
 for some Annualrents admitted to have been then paid, and
 Decreet is taken only for the Balance which was resting.

It is not, however, believed, the Heritors would give their
 Oath of Calumny on their Averment, as the Fact is notorious,
 and, if necessary, can still be proved; but without further, it
 is even corroborated by the very Circumstance founded on
 by the Heritors themselves, because those Annualrents de-
 ducted in the Decreet, were no other than, and arose from,
 the Rents of the Lands. The Trustees did not fall to give
 Credit for more than they had uplifted or received, but their
 giving

giving Credit for these Rents, shows, that they had been in Possession from the Year 1703, and no Claim was made upon them for the Tiends, for these sixty Years past, but they possessed the same, as well as the Lands, without any Interruption or Demand made by any Titular, or other Person pretending Right to them.

And, by Disposition of this Date, they disposed and made over the Premises, with all Right and Title standing in them, to the Memorialist, who, besides having a Right to the Reversion after mentioned, is further come into their Place, in consequence of the said Disposition. The other Heritors, indeed, pretended, that it appeared, by a Process of Reduction-improbation, Count and Reckoning, which he had brought some Time ago against the Trustees, that most of the Sums secured had been satisfied and paid by the Intromissions of the Managers, and that the Memorialist paid up the Balance, on obtaining a Discharge and Renunciation. But the Fact is misrepresented. The whole principal Sum, with Part of the Interest, remained due, and the Memorialist was obliged to purchase the Right from the Trustees, at the full Value of the Lands, on which occasion, for completing his Titles, it was found necessary they should grant him the Disposition last mentioned, and, of consequence, the Memorialist does humbly apprehend his Right is now established by the positive Prescription.

30th November,
1767.

The other Heritors, without disputing the Possession, pretended that the Memorialist had no proper Title, on which he could plead Prescription; for, that the original Right of the Trustees was no other than an heritable Bond or Security, granted by the said *James Dunbar of Dalcross*, for the 2000 Merks, payable to the said Trustees;—that the Charter and Sasine was no more than an heritable Infeftment granted to a Creditor, in Security of his Debt, and therefore could not be a proper Title or Foundation for establishing a Right of Property, either to the Tiends, or to the other Subjects over

Argument of the other Heritors.

B

which

which the Security was granted; that the Adjudication was also inavailable for the Purpose, because, it was said, the Tiends of these Lands belonged anciently to the Abbey of *Abbeville*; and, upon the Reformation, having come into the Family of *Pannure*, were completed by Infeiment;—that, therefore, they could not pass, or be transmitted by an Adjudication or other Right, that remained merely personal, but required an Infeiment for denuding the Earl of *Pannure*.

The Memorialist, that he may do Justice to this Argument, shall state the Progress and the Nature of the Rights, so far as seems to be necessary for understanding it.

The said *James Dunbar* of *Dalkeith*, heritable Proprietor of the said Lands, and others above mentioned, in 17-3, executed a Deed, proceeding on the Narrative of a Mortification formerly made by his Predecessor, *Alexander Dunbar* of *Barndolluth*, by which he bound and obliged himself and his Heirs, to content and pay to the Trustees therein mentioned, for the Use and behoof aforesaid, all and hail the Sum of 2000 Merks Scots, with the due and ordinary Annualrent of the same, yearly, termly, and continually, from the Term of *Whitsunday* then next to come, during the Not-payment; and to the Effect, the said Patrons, Trustees, and Administrators, for the Use and behoof of above specified, may be further secured anent the Premises, he, *inter alia*, grants Procuratory for resigning the Lands, Tiends, and others, in the following Terms:

“ Likewise, in order to the said Infeiment by *Resignation*,
 “ as said is, I hereby make and constitute, &c. likewise, I here-
 “ by resign, surrender, and overgive, all and hail my Lands
 “ and others above and after specified, &c. with all Right,
 “ Title, Interest, and Claim of Right, which, I, or my fore-
 “ fairs, had, have, or anywise may have, or pretend there-
 “ to, or any Part thereof, or any Annualrents or yearly Du-
 “ ties up payable forth of the same, in Time coming, during
 “ the first redemption under written, in the Hands of the pre-
 “ sent

“ sent Provost, Baillies, and remanent Town-counsellors of
 “ the said Burgh of *Inverness*, &c. in favour, and for *new*
 “ *Infeftment* of the same, to be made and granted, in due and
 “ competent Form, to the said Trustees, heritably, in real
 “ Warrantice, and special Security to them, for the Uses and
 “ Purposes above mentioned, &c. to be holden of the said
 “ Superiors in Feu and Heritage, conform to the original and
 “ late Infeftments, and as is customary and practicable in
 “ the like Cases, *redeemable* always, and *under Reversion*, in
 “ Manner under written.”

The Deed further contains a most ample Clause, assigning
 and transferring, to and in favour of the Trustees, the hail
 Writs and Evidents relating to the Subjects disposed, with an
 Assignment to the Mails and Duties thereof, *during the Not-*
redemption, surrogating and substituting the Trustees *in my*
full Right and Place of the Premisses, *during the foresaid Space*; as
 also a most ample Clause of Warrantice, warranting not only
 the present Right and Procuratory of Resignation above writ-
 ten, but also the Lands, *Tiends*, and others above expressed them-
 selves, “ *redeemable* always, and *under Reversion*, the said Lands,
 “ *Tiends*, and others above expressed, by me or my forefairs,
 “ from the saids Patrons, Trustees and Administrators, by
 “ Payment making to them, for their said Behoof, of the
 “ said principal Sum of 2000 Merks Money foresaid, and
 “ what of the Annualrents thereof shall happen to remain in
 “ the Hands of me and my above written, and be resting
 “ by us for the Time, with the Penalty above mentioned, if
 “ incurred, and Expences of the foresaid Infeftment, and o-
 “ ther Depursements above specified, if *they* shall happen to
 “ expend the same in our Defaults, according to their Ac-
 “ count of the same, on Honesty and Credit, hail and toge-
 “ ther in one Sum, at any Term of *Whitsunday* or *Martin-*
mas in Time coming, on due and lawful Premonition of
 “ sixty Days of before, to be made by us to them, personal-
 “ ly, or at their Dwelling-places, for that Effect, in Presence of
 “ an

“ an Notar and Witnesses, as effeirs; upon Payment where-
 “ of, or due and lawful Confignation of the same, in the
 “ Hands of the Provost, or any one of the Baillies of *Inver-*
 “ *ness*, most responsal for the Time, Premonition being al-
 “ ways made as above, the Lands, *Tiends*, and others above
 “ written, shall be holden and repute duly and lawfully re-
 “ deemed in all Time thereafter.”

It was upon this Deed, and the Procuratory therein contain-
 ed, that the Resignation aforesaid was made in the Hands of
 the Magistrates and Council of *Inverness*, who granted the
 Charter and Infestment above mentioned, by which they
 give, grant, and dispoñe to the said Trustees, all and hail
 the Lands, *Tiends*, and others above written, in the most
 ample Terms, *hereditarie, sub reversione tamen*.

The Memorialist transacted with the Trustees, and, by Dis-
 position above mentioned, they sold, annalizied, and dispoñed,
 to and in his favour, all and hail the Lands and others above
 mentioned, with all Right, Title, and Interest, which they
 or their Predecessors had, or could pretend in the same; and
 as the Disposition contains a Procuratory of Resignation, so
 the full Right, formerly vested in the Trustees, is now vested
 in the Memorialist, and he did thereby acquire Right to the
 Adjudication, Charter and Infestment, as well as all other
 Titles which pertained or belonged to them.

Memoria-
 list's An-
 swer.

Thus standing the Case, the Trustees appear to have had a
 most ample Right to the Lands and other Subjects dispoñed;
 they were intitled directly to enter upon full Possession, by
 uplifting the Mails and Duties, and exercising every other Act
 implied in Property, and they did so accordingly.

Their Right, however, was originally redeemable, and as
 they were intitled by the Charter and Infestment to no more
 than the principal Sum and Interest thereof, with the Ex-
 pences and others that should be incurred, so it was implied,
 that they were accountable for their Intromissions, but still they
 were not infest in an Annualrent merely, and therefore their
 Right

Right not being limited in that Manner, did truly resolve into an *improper Wadset*.

But the Memorialist is at a loss to understand, how he, or the Trustees, his Authors, could be thereby debarred or hindered from acquiring a Right by the positive Prescription to *Tiends*, or any other Subjects, over which his Security or Wadset extended.

The Trustees, by entering into Possession, became liable for the *Tiends*, and they or their Tenants were the only Persons, from whom any Titular pretending Right could have demanded them. It would therefore be hard, and seems not a little anomalous, to maintain, that they, possessing under two different Titles, a Charter and an Adjudication, could yet not acquire a good Right to the *Tiends* by Prescription, though they were expressly disposed to them by both Deeds.

A Wadsetter, proper or improper, possessing under Charter and Seafine, is and falls to be taken for full Proprietor in every Question with all others, except the Reverser, he can grant Tacks, and, with respect to the out-putting or in-putting of Tenants, has all the Rights competent to other Masters; with respect to the Superior, he falls to be considered as Vassal, and is intitled to the Renewal of his Investiture on every Occasion, which renders that Solemnity necessary: In short, *quoad omnes mortales*, he holds or can acquire the full Property of the Subjects wadsetted to him, as much as any other Proprietor.

Nor was any Distinction attempted to be made by the other Heritors between *Tiends* and Lands, or other Subjects, but all are in the same Circumstances, and if an heritable Right could not be acquired to the *Tiends* under the Titles above mentioned, so neither could it to the Lands or Fishings, Mills or others, which however it is not believed will be maintained.

Put the Case, that an improper Wadsetter has been in full Possession of Lands, by exercising every Act of Property under heritable Titles for forty Years, and that a Challenge was brought by a third Party, for declaring his Right to these Lands, and evicting them from the Wadsetter: it is asked, Whether the positive Prescription would not afford the Wadsetter a good Defence against such Challenge? the Party, by whom the Challenge was brought, would not be heard to plead, that the Wadsetter had no more than a *jus crediti*, or that his Right was extinguishable by his Intromissions, the Argument would be disregarded, and the positive Prescription would have two Effects in favour of the Wadsetter, *1st*, It would consolidate into his Right every Particular disposed to him over which his Security extended, and have the Effect to make it be deemed Part of the Subjects wadsetted to him. *2^{dly}*, It would secure to him an absolute Right to all and each of the wadsetted Subjects, *contra omnes mortales*, the Reverter excepted.

If it were otherwise, the positive Prescription could not possibly, in the present Case, run in favour either of the Wadsetter or of the Reverter; it could not run in favour of the Reverter, because he was denuded, and had no more than a personal Right, and was not immediately in Possession; nor could it run in favour of the Wadsetter, *propter defectum tituli*, because his Right gave him no more than a *jus crediti* in Security of his Debt; thus the whole Time, during which the Trustees possessed, could not possibly be available either to them, to the Memorialist, or to any other, a Proposition, which, it is not thought, will seriously be maintained.

The Possession of a Wadsetter, proper or improper, can surely be *conjoined* with that, either of the Reverter, or of any other Person claiming in his Right, for the Purpose of *completing* positive Prescription, already begun before his Wadset is created: and, as the *full Title* is in the Wadsetter, as long as the Wadset subsists, or his Right is not redeemed, so

so it does not seem to admit of a Doubt, that Prescription can also *begin* at the Wadsetter, and that the forty Years, commencing from the Time of his entering into Possession, may be compleated in another Party, deriving from, or connecting with him.

Nor can it have any Influence, that the Infeftment granted in favour of the Trustees, bears to be in Security and Warrandice, because the Matter is still clear, that the *full Right* to all the Subjects disposed *was made over* to, and vested in them, in the most ample Terms, *during the Non-redemption*. *Dalcrofs* was effectually denuded; he granted Procuratory for resigning the Subjects, and they were resigned accordingly; he empowered the Trustees to enter directly upon Possession, and a Charter and Infeftment were expedie in their favour, by which all the Right that was in *Dalcrofs* came into their Persons, and it remained with them, as long as he did not exercise the Faculty of Redemption.

It is true, as was said by the Heritors, that the Trustees were Creditors; so is every Adjudger and Wadsetter, proper as well as improper, but they were also more; they were not confined to a precise Annualrent, or yearly Feu-duty upliftable out of the Subjects, but their Right was full and unlimited, extending to the Subjects themselves; and they were empowered to uplift the *whole* Mails and Duties issuing out of all and each of the Subjects disposed; and a Resignation was necessary for denuding them; nor could their Right otherwise return to the Reverfer. It was therefore a Wadset, and so it is called in the very Schemes of Locality, made out at the Sight of the Heritors, and so they are insisting your Lordships shall approve.

And it is a Mistake to say their Titles did not import a Disposition, or contain any dispositive Words. The Charter, which it is obvious the Heritors would fain forget, or keep out of View, contains very pointed and ample dispositive Expressions, as well as the Adjudication; and, as these gave them a Right of
Property

Property, so they entitled them to fortify their Rights by Prescription.

Nor can the *Modus* or Manner, redeemable or irredeemable, in which they held, or by which their Right was qualified, influence the Question, because that is *jus tertii* to all other Parties, the Creditor or Wadsetter, and Debitor or Reverser only excepted.

If an Adjudger expedes an Infeftment upon his Adjudication, he is no more than a Creditor during the Legal, and his Right affords him no more than a Security over the Subjects adjudged, as it may be redeemed. The Time, however, during which he possesses, would be available, either to himself or to the Reverser, on his exercising the Faculty of Redemption, in any Question concerning the positive Prescription; nor would a third Party be heard to plead that he had no more than a *jus crediti*, and, therefore, that he could not acquire a Right of Property by the positive Prescription, his Possession would be *conjoined*, either with that which preceded, or that which followed it, in the Person of another, to compleat the Prescription; and if the Adjudger himself possessed for forty Years, the Prescription would be compleated in his own Person alone.

This is extremely apposite and analogous to the present Case. If the Possession of the Trustees could not be counted to compleat the positive Prescription, it does not occur why that of an Adjudger should, which yet it is impossible to deny. It is true, the Wadsetter or the Adjudger can never prescribe against the Reverser, as long as the Term for redeeming is open: But that is little to the Argument; for it is the Right of Reversion only which they cannot prescribe against him, and *that* they cannot prescribe, because it is a Burden or Condition under which they hold, expressed in the Right, or imposed upon it by Law; but other Things they can prescribe against *him*, as well as against third Parties. Thus, if a Wadset should be granted, concerning which a Doubt should arise, whether

whether a Fishing or other Subject was one of the wadsetted Subjects, and the Wadsetter had possessed the Fishing or other Subject, it will not be doubted that he would be entitled to avail himself of his long Possession, in a Question with the Reverser, as well as with others, for establishing and ascertaining the particular Subjects over which his Right extended, provided his Charter or Wadset-right contained a Clause, or Words, which could be explained by Possession, to comprehend the Particular in question. Indeed, it can rarely happen to a Wadsetter to prescribe against the Reverser: His Possession must generally operate in favour of the Reverser to enlarge his Right; and as it would be sufficient to secure to the Wadsetter, any Subject which he had possessed during the Years of Prescription, so his Right, on being transferred to the Reverser at the Redemption, must return and accresce, in the State and Condition in which it was at the Time.

And this will hold, whether the Possession be partial or total, held by a Wadsetter or a Creditor. A Creditor or Tenant, as well as a Wadsetter, possesses under the Party from whom he derives, and, therefore, so far as his Possession goes, and is beneficial to the Debitor, Landlord, or Reverser, they are respectively entitled to avail themselves of it, because it is truly held to be their Possession; and as they are held to possess by those holding under them, so they are entitled, on refusing or being restored to their full Right, to take the Benefit of that Possession for enlarging their own Property, either by pleading the positive Prescription upon it, if it has been undisturbed for forty Years, or to conjoin it with their own, for the Purpose of completing the Prescription.

If, therefore, the Trustees should even be considered not in the Light of *Proprietors*, but to have been Creditors, merely having an heritable Security, as the other Heritors contend, it does not occur why they could not establish, by Prescription, their Right or Security to extend over all the Subjects therein contained, of which they had Possession. Even a

Tack may be established and confirmed in that Manner, but their Infeftment containing a Right to the Maills and Duties for an indefinite Term, was at least equivalent to a Tack; and if the Tenant's Possession would be available to his Landlord, so must theirs. *fo far as it extends*, in a Question with every Person, at least, other than him from whom their Security is immediately derived, especially with one who does not himself pretend Right to the Subject in dispute. Lord *Bankton* (Vol. II. p. 162) says, "The Possession of Adjudgers, Wadsetters, Liferenters, and others in the Right for the Time, is conjoined to perfect the Prescription, as well as that of Predecessors and Heirs."

But, 2^d, Exclusive of the Charter and Infeftment, the Memorialist humbly submits, that he has another Title, equally available to found him in Prescription, and that is the Decree of Adjudication above mentioned, to which, as well as the other Titles, he has now a full Right, in consequence of the Disposition lately granted in his favour by the Trustees.

And 1st, this puts an End to an Argument, on which much Stress was laid by the other Heritors, that the Right of the Trustees was not a Right of Property, but was redeemable, nay, extinguishable by their Intromissions; for the Moment the Legal was expired, it became an absolute and complete Right, which could not be either redeemed or extinguished in that Manner.

But, *secondly*, it will not be disputed, that a Party, possessed of several different Titles, may ascribe his Possession to all, and each, or any of them, which will be most beneficial; and as the Trustees had the Decree of Adjudication, as well as the Charter and Infeftment, standing in their Persons, so the Memorialist can connect and found upon both, or either, to support his Plea.

A Disposition, or other personal Right, gives a complete Title to Tiends, and, therefore, is sufficient for founding a prescriptive Right to them, as has been often decided, particularly

cularly in the late Cases of *Kennedy* of *Knock Gray*, and of *Irvine of Drum*.

The only Difficulty, therefore, which can occur in the present Case, arises from the Objection started by the Heritors, that the Tiends in question appear from the Records to have been once constituted by Infeftment, and, therefore, that an Infeftment is necessary to transmit them.

The Memorialist must fairly allow this Point is not without Difficulty, but he submits the Destination to be solid that is made between Subjects to which a complete Right can, and those to which a complete Right cannot be acquired, without Infeftment.

In the last Case, a Seafine or Infeftment is always requisite, after as well as before the 40 Years are run; but, in the first, the Memorialist does humbly contend, that all which he is required to do, in Terms of the Statute 1617, is to produce such Title as is understood in Law to be sufficient for conveying or vesting the Subject, and this, on being followed with Possession, will establish the Right by Prescription.

A Disposition, or a Decreet of Adjudication, flowing *a vero domino*, gives a Right absolutely good to Tiends, and one, which flows *a non domino*, is undoubtedly capable of being established by the positive Prescription.

Not only so, but in all Cases in which positive Prescription, or Possession following upon a Title *ex facie* good, is proved, all other Rights, under which Parties can, or pretend to claim the Subjects prescribed, are held in Law to be *false* and *forged*, and the Party holding under those Rights, so validated by Prescription, is entitled, on bringing a Process of Reduction and Improbation, to prevail in getting the Rights of all others claiming those Subjects, actually declared to be *false* and *forged*, as well as reduced and set aside on that Ground, by a formal Decree of the Court of Session.

The Memorialist, therefore, the Moment forty Years Possession was held on the personal Right of this Adjudication, was
entitled

entitled to have brought a Reduction and Improbation against the Family of *Pannure*, as well as all others, for reducing those very Infeiments on which the other Heritors now plead, and as he must have prevailed in obtaining them to be declared false and forged, so Titles, liable to *that* Challenge, can never be revived to cut down his Plea of Prescription, but must be totally disregarded, or held never to have been in Existence.

If the forty Years had not been run, it might, perhaps, have been competent for the other Heritors, as well as the Earl of *Pannure*, to say, that the Title of the Memorialist, or the Trustees, was not perfectly, or rather formally complete: But Prescription is intended for the Purpose of supplying Defects of Title, as well as for settling all other Objections, and, therefore, every Thing is presumed, even an Act of Parliament, in favour of a Party who produces a habile Title, on which Possession has followed, and he is entitled to say, that the Legislature itself hath interposed and enacted, that the Infeiments, standing in the Family of *Pannure*, were false and void, and that an Infeiment was not necessary to be expedited in his Person, in order to connect or complete his Progress.

In every Case, in which a Party pleads positive Prescription, he is not bound to go farther back than the first complete Title, immediately antecedent to the Commencement of the 40 Years; he is not obliged to produce other more ancient Titles, or account for any thing that may be produced against him: That is one capital Benefit arising from Prescription, that Parties are not even necessitated to keep old Papers, which Prescription renders useless, and, therefore, it is not competent to any Party to oblige another, who produces a good prescriptive Title, sanctified by Possession, to enter into any Argument concerning others, upon which he does not found, nor will his Titles, supported in that Manner, be allowed to be destroyed or cut down, but the Interposition of the Legislature itself, with every other thing necessary for supporting his Plea, would be presumed in his Favour.

An

An Impression is attempted to be made by this Pursuer, who assumes the Names of the other Heritors, as if the Delay in settling this Locality had been entirely owing to the Memorialist.

But the Clamour is extremely affected; from the Detail given in the Memorial for the Heritors, your Lordships see the same Thing happened here as is common in all other the like Cases, that the Locality was not vigorously pushed by any Party till within these two Years. The Process was allowed to fall asleep, and many of the other Heritors, from Time to Time, produced Rights to their Tiends, which created new Questions and Delays. And though the Memorialist's Agent attended before making up the last Locality, that would not, at any rate, be of any Consequence, as the Memorialist had other Lands in the Parish, and it was only lately that he made the Transaction with the Trustees, and got the Rights to the Subject in question out of their Hands, before which, he had no Interest or Title to object to the Locality, so far as respected the Lands then belonging to the Trustees for the Poor; that was the Business of those who acted for the Hospital, but the Moment a Handle was taken to alter the Locality, on occasion of the Memorialist's Purchase from the Hospital, and to load that small Subject with more Stipend than it formerly paid, he not only entered his Objections to it, but prevailed in getting one of these Objections sustained; and it is the other only, to which this Memorial, given in by Order of the Court, relates.

It was further said, with the same View of creating an unfavourable Impression, that the Memorialist had denied that the Family of *Pannure* stood inest in the Tiends of this Parish.

But here also the Fact is misrepresented. The Right of the Family of *Pannure* was a Fact of which the Memorialist knew nothing; and as it was not mentioned in the Answers to the Reclaiming Petition, but popped out from the Bar at advising, so your Lordships remitted to the Lord Ordinary to enquire into the Fact, and to hear the Parties upon that and other Points of the Cause, and, upon the Memorialist's Doer being satisfied from the Records of the Fact's being as stated by the other Party, it was very readily admitted.

In respect whereof, &c.

GEO. WALLACE.

M E M O R I A L

F O R

ALEXANDER FRASER of *Culduthill*, and others, Heritors of the Parish of *Inverness*;

A G A I N S T

GEORGE BAILLIE of *Leys*.

THE teinds of the parish of *Inverness* anciently belonged to the abbacy of *Arbroath*; but after the reformation, were conveyed to the family of *Panmure*, to whom they still belong, as appears from a charter on record in chancery, of this date, in favours of the present Earl; ^{Aug. 1765} comprehending the barony of *Arbroath*, with all the rights which formerly belonged to the abbacy and Lords of erection of *Arbroath*; and, *inter alia*, *cum decimis rectoris et vicarii ecclesie de Inverness*.

In 1688, *Alexander Dunbar* of *Balmuckatty* mortified 2000 merks for the use of eight poor people in the town of *Inverness*, the fund to be under the administration of the kirk-session, and to remain in the hands of him and his heirs, till a proper purchase or wadset should offer, on which it might be laid out.

It appears, that of this date, *James Dunbar* of *Dalcrofs*, heir ^{April 2 1703} of the mortifier, granted bond for this sum, engaging to pay it whenever a purchase or wadset should offer, in terms of the mortification; and that it might be properly secured in the mean time, engaged to infect the managers in certain small subjects, called *Gallamuir* or *Millfield*, and granted procuratory of resignation for that purpose; and though he had no right or title
whatever

whatever to the tithes, yet these were thrown into the heritable bond, along with the lands themselves.

Upon this procuratory, the managers obtained a charter of resignation from the town of *Inverness*, and were instelt.

It would appear, that the managers had neither entered to possession upon their heritable bond, nor obtained punctual payment of their interests; for, of this date, they obtained decret of adjudication, adjudging the subjects affected by their heritable bond, and some others that belonged to *Dalcroft*, not only for the principal sum and penalty, but likewise, for a considerable balance of annualrent that had been resting since the 1703, after allowance of those that had been paid; and at what time they entered into possession, does not certainly appear.

George Baillie of *Lays*, having succeeded to the subjects affected by the heritable bond, and some others, which belonged to *Dalcroft*, did some time ago bring a process of reduction and improbation, and for compt and reckoning, against the managers; in the course of which it appeared, that most of the sums secured had been satisfied and paid, by the intromissions of the managers; Mr. *Baillie* paid up the balance, and obtained a discharge and renunciation, which was then thought a sufficient extinction of that incumbrance.

The ministers of *Inverness* brought a process of augmentation in 1753, and obtained a decret of modification in 1756; from which time no steps were taken towards the locality till the 1760, when several heritors, from whom the ministers had exacted the whole of the augmented stipend, in order to relieve themselves, hurried on an interim locality, by which the whole augmented stipend was laid upon the lands of certain heritors who had rights to their tithes, but who, from various causes, were not then on their guard, and did not produce their rights. Compareance, however, was then made for Mr. *Baillie*, who in the last stage of that interim locality produced a right to the tithes of some of his lands, which was received, upon his paying the expence incurred by his not producing earlier.

The process again lay over till 1764, when, in order to obtain a locality properly and finally adjusted, it was awakened in the name of Mr. *Frazer*, the memorialist, who, with some other heritor, produced a right to their tithes; and so early as 2d March 1765, the Lord *Kennet*, Ordinary, pronounced an interlocutor,

terlocutor, ordaining the several heritors to produce their rights to their teinds against the 12th *June*, then next, with certification.

By an after interlocutor, 22d *June* 1765, the time was prorogated till the 12th *July*; and the Lord Ordinary appointed intimation of that interlocutor to be given in the news papers; which was accordingly done. Several appointments were afterwards made to the same purpose, by interlocutors 21st *December* 1765, 8th and 24th *February* 1766; the last of which was with certification, that no interest would be received after the 1st *May* then next, without an amand of 20 s. *Sterling*.

In *June* 1766, when no more productions were expected, and every thing disputable was thought to be determined, the Lord Ordinary remitted to the clerk to prepare a scheme of the locality; which was accordingly done: But before giving the scheme into process, the clerk called a meeting of the several agents concerned, in order to avoid any mistakes; at which meeting the doer for Mr. *Baillie* was present.

The scheme having been admitted by all present to have been right, in so far as it shewed the extent of the free teinds in the parish, was accordingly given in to process; and by an interlocutor of this date, the heritors were allowed to see it in the clerk's hands, and to object against next calling. July 22.
1766.

Objections were afterwards made on the part of Mr. *Robertson* of *Inches*, which were finally over-ruled by an interlocutor 20th *January* 1767. An interest was afterwards produced for another heritor; which was admitted, upon his paying the expence of the rectification. And as every thing now seemed to be adjusted, a second remit was made to the clerk, a rectified scheme prepared, and afterwards a locality, which having been appointed to be seen by all concerned, was approved, by interlocutor of the Lord Ordinary, of this date.

During all this time, no objection was offered on the part of Mr. *Baillie*, and all disputes were thought to be at an end: Of this date, however, Mr. *Baillie* preferred a representation, setting forth, that he had right to the teinds of the lands of *Gallamuir* or *Millfield*, pretending that his titles were in the hands of the managers of the hospital of *Inverness*, and craving a diligence to recover them. Feb. 5.
1767.
Feb. 7.
1767.

The

The other heritors, desirous to have the locality brought to a period, not only consented to Mr. *Baillie's* getting a diligence, upon condition of his paying the expence of the locality, but further insisted, that he should be allowed first and second diligence, and a commission to the country, in order to prevent delay; but this he declined, and thereby put off the locality the remainder of that session, without producing any right, or extracting any diligence, which, indeed, was unnecessary, as the rights on which he has since founded, fell to be in his own hands from the beginning.

In *June* 1767, Mr. *Baillie* at last produced the heritable bond 1763 above mentioned, with the charter and infestment thereon, in favours of the managers of the hospital; and with this production made two objections to the locality, *1st*, That he was overcharged in a trifle of old stipend; and, *2^{dly}*, He insisted, that he had a prescriptive right to the teinds of the lands of *Gallanour* and *Millfield*, in virtue of the possession of those teinds for more than 40 years by the hospital, upon the above mentioned heritable bond and infestment.

Answers having been made upon the part of the other heritors, the Lord Ordinary, of this date, sustained the first objection, but repelled the second, and, upon advising representation and answers, adhered.

Mr. *Baillie* then preferred a petition to your Lordships; to which answers were given in on the part of the other heritors. But a few days before advising, Mr. *Baillie* made a new production of the adjudication above mentioned, deduced by the managers of the hospital, together with a disposition granted by them to him, dated 30th *November* 1767, *i. e.* about two weeks after his petition was preferred to the court.

This new production prevented the cause from being then determined; for though, in answer thereto, it was observed, that the teinds in question having belonged heritally to the family of *Pannure*, could not be carried by an adjudication without infestment; yet this fact having been denied on the part of Mr. *Baillie*, it became necessary to remit to the Lord Ordinary to inquire into it.

Such evidence of this fact having been accordingly produced, as forced an admission upon the part of Mr. *Baillie*, the Lord Ordinary again made *ex pendens* to the court, with the petition and answers,

answers, and said admission: And the cause being afterwards stated by his Lordship at the foot of the table, the court was pleased, of this date, to pronounce the following interlocutor: Mar. 2., 1763.
 “ The Lords having again heard this petition, with the answers,
 “ they remit to the Lord *Kennet* Ordinary, to appoint memorials
 “ to be given in upon such parts of the cause as he shall think
 “ proper, and that betwixt and the first sederunt day of *June*
 “ next.”

Accordingly, of this date, Lord *Kennet* “ ordained memo- Mar. 4., 1763.
 “ rials upon the whole cause, to be given in to the Lord Ord-
 “ nary, on or before the 14th *June* next.”—In obedience to which
 interlocutor, this is offered on the part of Mr. *Frazer*, and the o-
 ther heritors.

The question at issue is, whether Mr. *Baillie* has prescribed a right to the property of the teinds of his lands of *Gallamuir* and *Mulfield*; and, as it is not pretended, that there was any right or title to these teinds in Mr. *Dunbar* of *Dalcrofs*, prior to the heritable bond granted by him to the managers of the hospital; to Mr. *Baillie* rests his plea entirely upon that bond, with the charter and investment following upon it, and the adjudication afterwards led by the managers against *Dalcrofs*. The memorialists, on the other hand, hope to show that neither *Dalcrofs* nor the hospital could acquire right to the property of these teinds, upon either of these titles.

Mr. *Baillie* was pleased to call the deed in favour of the hospital a wadset; and, on the supposition of its being a right of that kind, reared up a very long argument, with regard to the nature of prescription upon wadset-rights; but the memorialists will beg leave to call that deed by its own name, an investment in security, or an heritable bond; which last is the name invariably given to it in all the transactions between the parties; and, indeed, so far from being considered as a wadset, the deed itself bears, that it was only an *interim* security, till a purchase or wadset should offer, in terms of the mortification.

The bond proceeds upon the narrative of the mortification, which required that the money should lye in the hands of the mortifier, or his heir, till a purchase or wadset should offer; that it was still in *Dalcrofs*'s hands; “ and as
 “ it was agreeable to all the rules of equity and conscience,

B.

“ that.

“ that the said principal sum should be paid, and *effectually secured*.” Therefore, *Dater* “ bound and obliged himself, his heirs, successors, and executors whatsoever, conjunctly and severally, *to content and pay* to the kirk-session, &c. all and hail the foresaid sum of 2000 merks, and that at any term of *Whitsunday* or *Martinsmas* in time coming, at which it shall be found by the said minister or ministers, &c. that the said sum shall be got conveniently bestowed on land, in heritage or wadset, conform to the foresaid mortification, without longer delay, with the sum of 400 merk money above written, as liquidate expences in case of failure.” Likewise, he bound and obliged himself to pay the due and ordinary annualrent of the said principal sum, yearly and termly, during the not payment.

There follows a clause in these words: “ And to the effect, the said patrons, trustees and administrators, for the use and behoof above specified, *be further secured* anent the premises, I the said *James Dunbar*, as heritable proprietor of the lands and others underwritten, with the pertinents, without prejudice or derogation to the contents foresaid of the said mortification, and what has followed, or may follow thereupon, or to the said personal obligation, and what may follow on the same, but in further corroboration thereof, *accumulando jura jurius*, by thir presents, bind and oblige me, my heirs and successors, with all convenient diligence, and on our own expences, duly and sufficiently to *insist and seize*, by the resignation underwritten, the patrons, trustees, and administrators foresaid, and their respective successors in place and office, for the use and behoof of the eight poor, indigent persons above specified, heritably, under the reversion underwritten, in my lands and others underwritten, all lying within the territory and parish of *Inverness*, viz. in all and hail my lands of *Gallanear*, &c. with the tithes: and that *in real warranty and special favour* to the said patrons, trustees, and administrators for the foresaid use and behoof, far and anent the payment to them in the cases and circumstances, and with and under the provisions and conditions above express, of the said principal sum of 2000 merks, and penalty above written of 400 merk money foresaid, when incurred, and the annualrent of the principal sums aforesaid.”

There

Then follows a procuratory of resignation in common form, for infefting the ministers and kirk fession, &c. “ heritably, *in re- al warrandice and special security* to them, for the said use and behoof, for and anent the payment of the said principal sum, penalty, annualrent, and others above narrated, *redeemable al- ways*, &c.

The infeftment taken by the kirk fession, &c. was precisely conform to the bond, and bears exprefly to be *in securitatem et warrintazitionem* of the mortified sum.

The memorialists apprehend, it is impossible for Mr. Baillie to difguife the real nature of this right. He may call it by what name he pleafes ; but it is indifputably that fpecies of heritable bond, known by the name of an infeftment in security.—A right which differs from a wadfet in every refpect, in its constitution, its nature and effect, and in the mode of its extinction. In a wadfet, the *property* of the fubject is difpofed to the wadfetter. The wadfetter is infeft in the *property*, fubject indeed to reverfion. He is *proprietor* to all intents and purpofes, except in queftions with the reverfer, and his right muft be extinguifhed by renunciation or resignation, according as it is held, either of the reverfer, or of his fuperior ; in a word, it is a fale under reverfion. The cafe is different in every particular with regard to the right in queftion. The *property* is not difpofed, neither is infeftment taken in the *property*, but only *ad hunc effectum*, that the creditors may be *secured* in payment of this debt ; it is therefore nought elfe but a *nexus* or incumbrance ; and being acceffory to the perfonal obligation to pay, when that obligation is vacated, either by payment or intromiffion, the infeftment falls of courfe, without resignation or renunciation, and that without diftinction, whether it is held of the debtor, or of his fuperior.

The memorialifts, therefore, with fubmiffion apprehend, that it is quite unnecelfary to purfue Mr. Baillie through the long difcuffion of the nature of prefcription upon wadfet rights, as the whole of his argument upon that head does not apply to the fact in this cafe : This right is not a wadfet. But not to difpute any more about names, the memorialifts humbly maintain, that whatever name is given to the right in queftion, it is from its
nature

nature evident, that it could not be a title whereon either the hospital or Mr. *Dunbar* could acquire the *property* of these tithes.

The hospital could not acquire the property, because they had no title to, or interest in the *property*: For them to have acquired the *property*, would have been to prescribe, contrary to their own title, whereby they had only a right of *security or warranty*. Possession for the time prescribed by law, validates a right as it is, and covers it from extraneous challenges, arising from a defect of power in the grantor, or otherways: But it is believed it never was maintained, that it had the effect to operate a transmutation of a deed from one species into another totally different, or to change a right expressly granted in *security* only into a right of *property*, which seems to be the import of the plea maintained by Mr. *Baillie*.

With regard to *Dalrymple*, the debtor in the heritable bond, the case seems still clearer, that he could not prescribe a right to the property of these tithes, for this obvious reason, that he had no title. It surely requires no argument to shew, that he could not create to himself a title to the property of the tithes, merely by granting an heritable bond or security over them to a creditor. It is true, that the possession of a creditor, is, in the eye of law, counted that of a debtor in cases of prescription, and so is the possession of a tenant considered as the possession of the master: But then, both the debtor and the master must have a title of property in him, before he can avail himself of the possession of those in his right: But here it is evident, that *Dalrymple* had no title to, or interest in the property of the tithes: and therefore, with regard to him, and to the effect of establishing a prescriptive right in his favour, the possession of the hospital was without a title.

This doctrine seems to the memorialists so extremely clear, that they apprehend it were improper to multiply words upon it. They will only add, that as it is founded in the nature of the thing, so it necessarily follows from the words of the act 1617, which enacts, " That what ever have brunched by themselves, their tenants and others, having their right, their lands, baronies, annualrents and other herriages, by virtue of their *heritable interest* made to them, by his Majesty, or others, their superiors and others, for the space of forty years continually and together,

“ gether, and that peaceably, without any lawful interruption
 “ during the said space of forty years ; that such persons, their
 “ heirs, &c. shall never be troubled, pursued or inquieted in the
 “ heritable right and property of the said lands and heritages, &c.
 “ providing they be able to show and produce a charter of the
 “ said lands to them, and others their predecessors, by their said
 “ superiors and authors, preceeding the entry of the said forty
 “ years possession, with the instrument of sasine thereon.”

It seems impossible that this statute can apply to the case of Mr. Baillie, who shows no charter or sasine either in the person of him, or of any of his predecessors or authors, bestowing upon him the *heritable right and property* of these teinds, but merely a charter and investment in the person of a creditor of his author ; and that expressly bearing to be in warrandice and security of a sum of money.

In a word, to this hour there appears no *title to, or investment in the property* of these teinds any where, except in the person of Lord Panmure, who certainly may claim them when he pleases.

The memorialists might contend in the *second* place, that suppose the hospital could have acquired a right to the teinds upon this heritable bond, yet this could not avail Mr. Baillie in the present question, in regard the right of the hospital was fully extinguished by their discharge and renunciation.

It is true, that after two interlocutors of the Lord Ordinary against him, and after he had reclaimed to the court, and was well apprised of the various objections to his title, Mr. Baillie, in order to vamp it up as well as possible, and to give his transaction with the hospital something of the air of the transmission of a right, instead of the extinction of an incumbrance, prevailed with the managers to sign a disposition in his favours : But it seems impossible to maintain, that this could have the effect to revive a right *ab ante* extinguished, and which, therefore, could neither be conveyed by the hospital, nor received by him.

3dly, It does not appear, at what time the hospital entered into possession of the subjects affected by the heritable bond ; one thing seems certain, that they did not enter into possession in 1703, for it appears, that in 1706 they made requisition against Mr. Dunbar,

not only of the principal sum, but likewise of the whole annual-rents due upon the bond. The same likewise appears from the decret of adjudication, whereby the subjects are adjudged for a considerable balance of annual-rents, after allowance of some said to have been paid, which it is believed could not have happened if the hospital had been in possession, as it is not probable they would take an heritable bond over subjects, the rents of which were not at least equal to the annual-rents of the sum secured. As this fact was only discovered from Mr. *Baillie's* last production, *viz.* the disposition and adjudication, in both of which, the requisition 1706 is mentioned, it could not formerly be taken notice of, on the part of the memorialists.

Mr. *Baillie* further insists upon the adjudication led by the hospital against his author Mr. *Dunbar*, as a title of prescription; but the memorialists apprehend, that this can no more avail him than the other. It is now an agreed fact, that those teinds belonged heritably to the family of *Pannure*, as come in place of the abbots of *Abbeis*, and not as patrons, in virtue of the acts 1600, and 1693; and that they were constituted by infestment: That being the case, the memorialists are advised, that according to the authority of every lawyer, as well as of every precedent of the court, the property of these tithes could not be carried without infestment; and as there was no infestment on this adjudication, it necessarily follows, that it could not be a habile title of prescription.

In answer to this, Mr. *Baillie* says, that there is a solid distinction between such rights as *can*, and such as *cannot* be acquired without infestment: This the memorialists do not need to dispute. It is sufficient to say, that teinds once constituted by infestment, *cannot* be effectually transmitted or acquired without it.

It is likewise said, that prescription is intended to supply the defects of title, as well as to surmount other objections.—That all deeds, in opposition to the prescriptive right, are in law to be held as false and forged; and that Mr. *Baillie* was intitled, so soon as the 40 years were run, to have brought a reduction and improbation against the family of *Pannure*, and got their infestment in the tithes set aside on that ground.

It is believed, these positions will have very little weight with your Lordships. The *first* especially seems a very extraordinary one: When applied to the present case, it seems to involve at once two species of false logick, first begging the question, and then arguing in a circle. Mr. *Baillie* first takes it for granted, that he has prescribed a right, and then argues, that this prescription is to supply, not a defect in a title of prescription, but the *want of* a title, *viz.* of the investment upon the adjudication. The rest of his argument upon this head proceeds likewise upon a palpable *petitio principii*, taking it for granted, that he has prescribed a right, though the question at issue is no other, than whether he has, or has not.

To conclude, the memorialists having already taken the liberty to state at length the procedure in this cause; they will not detain the court by a recapitulation of it here; and as they flatter themselves the court will have no difficulty to adhere to the Lord Ordinary's interlocutors; so they must humbly submit, whether they are not justly intitled to be indemnified of the expence incurred by this litigation with Mr. *Baillie*, as well on account of the nature of his plea, as of the extraordinary manner in which it has been conducted on his part, from first to last.

In respect whereof, &c.

AD. ROLLAND.



JANUARY 16, 1769.

Unto the Right Honourable the Lords of Council and Session, Commissioners for Plantation of Kirks and Valuation of Tiends,

T H E
P E T I T I O N
O F

GEORGE BAILLIE of *Leys*,

Humbly sheweth,

THAT the Lands of *Gallamuir*, and eighteenth Part and an half above the Hill, commonly called the *Millfield*, belonged in Property to *James Dunbar* of *Dalcrofs*.

That *Alexander Dunbar* of *Barmuckaty* having mortified the Sum of 2000 Merks *Scots* for the Use and Behoof of eight poor, weak, and old Persons, within the Burgh of *Inverness*, and to be under the Management of the Ministers and Kirk-session thereof, the foresaid *James Dunbar* of *Dalcrofs*, who, after *Barmuckaty's* Death, became liable for the Payment of the aforesaid Sum, executed a Deed, of this Date, proceeding upon the Narrative of the aforesaid Mortification, by which he bound and obliged him, his Heirs, &c. to content and pay to the Members of the Kirk-session therein named, and their Successors in Place and Office for the Time, as Patrons, Trustees, and Administrators, for the Use and Behoof of the said eight poor, old, and weak Persons above mentioned, the said Sum of 2000 Merks, and that at any Term of *Whitsunday* and *Martinmas*, at which it shall be found, by the said Minister and Elders for the Time being, or major Part of them, that the said Sum shall be got conveniently bestowed on

April 27,
1703.

A

Land

Land in Heritage, or *Heret*, conform to the foresaid Mortification, with 400 Merks of Penalty, in case of Failure, and ordinary Annualrents of the said principal Sum, during the Non-payment, &c.

The said *James Dunbar*, by this Deed, did farther bind and oblige him, his Heirs, &c. to invest and lease the Patrons, Trustees, and Administrators foresaid, and their respective Successors in Place and Office, for the Use and behoof of eight poor, indigent Persons, above specified, heritably, under the *Reservation* under written, in the Lands and others after mentioned, all lying within the Territory and Parish of *Inverness*, viz. in all and hail his eighteenth Part and an half eighteenth Part arable Field-land above the Hill, commonly called the *Millfield*, bounded in Manner therein mentioned.—*Item*, In all and hail his arable Field-land, and others commonly called the *Gallamuir*, &c.—*Item*, In all and hail his four Acres of arable Field-land, of and in the Field called the *Dempster*, &c. with the *Tiends of the hail*, and *several Lands above written*, and that in real Warrantice and Special Security to the said Patrons, Trustees, and Administrators, for the foresaid Use and behoof, for and anent the Payment to them of the said principal Sum of 2000 Merks, and Penalty, when incurred, and the Annualrents of the principal Sum, to be distributed and applied, as said is, with the Charges of the Investment to follow hereupon, and such other Sums as shall be disbursed in relation to the Premises.

By this Deed he grants Procuratory for resigning the Lands, " Likeas I hereby resign, and surrender, and over-give, all and
" hail my Lands and others above and after specified, viz. my
" said eighteenth Part, and half eighteenth Part of arable Field-
" land above the Hill, commonly called the *Millfield*. *Item*, My said
" arable Field-lands and others, commonly called the *Gallamuir*,
" with my said four Acres of arable Field-land, of and in the
" foresaid Field, called the *Dempster*, with the said *Tiends of the*
" *hail* and *several Lands above written*, and hail Houses, Big-
" gings, Yards, Liberties, Privileges, and Pertinents belonging
" thereto, lying denominate and bounded *ut supra*, together with
" all Right, Title, Interest, and Claim of Right, which I or my
" forefairs had, have, or any way may have, or pretend thereto,
" or any Part thereof, or any Annualrents or yearly Duties uplift-
" able forth of the same, in Time coming, during the *Nat-re-*
" demption

“ redemption underwritten, in the Hands of the present Provost,
 “ Baillies, and remanent Town-counsellors of the said Burgh or
 “ *Inverness*, representing the Body and Community of the Burgh,
 “ or their Successors in Place and Office, my immediate lawful
 “ Superiors thereof, in favours, and for new Infeftment of the
 “ same, to be made and granted in due and competent Form,
 “ to the said Mr. *Hector Mackenzie*, Minister foresaid, &c.”

This Deed contains an Assignment to the haill Mails and Duties
 of both Lands and Teinds, during the Not-redemption; and it
 contains a Clause of Redemption in the following Words: “ Re-
 “ deemable always, and under Reversion, the said Lands, *Tiends*,
 “ and others above expressed, by me, or my forefairs, from the
 “ said Patrons, Trustees and Administrators, in name of the said
 “ eight poor, weak, indigent Persons, be Payment making to them,
 “ for their said Behoof, of the said principal Sum of 2000 Merks
 “ Money foresaid, and what of the Annualrents thereof shall happen
 “ to remain in the Hands of me and my above written, and bees
 “ resting by us for the Time, with the Penalty above mentione’d,
 “ if incurred, and Expences of the foresaid Infeftment, and other
 “ Disbursements above specified, if they shall happen to expend
 “ the same in our Defaults, according to their Account of the
 “ same in Honesty and Credit, haill and together, in one Sum,
 “ at any Term of *Whitsunday* or *Martinmas*, in Time coming, on
 “ due and lawful Premonition of sixty Day, of before, to be made
 “ be us to them, personally, or at their Dwelling-places, for that
 “ Effect, in Presence of a Notary and Witnesses, as effairs; upon
 “ Payment whereof, or due and lawful Consignation of the same,
 “ in the Hands of the Provost, or any one of the Baillies of *In-*
 “ *verness*, most responsal, for the Time, Premonition being always
 “ made as above; the Lands, *Tiends*, and others above written,
 “ shall be holden and repute duly and lawfully redeemed in all
 “ Time thereafter.”

By a Charter, of this Date, proceeding upon the *Resignation* of April 27, 1703.
James Dunbar of *Dalcrofs*, made in virtue of the foresaid Procura-
 tory, the Provost and Magistrates of *Inverness*, Superiors of the
 Lands therein mentioned, disposed, confirmed, and made over to,
 and in favour of Mr. *Hector Mackenzie*, Minister of *Inverness*, and
 others, Members of the Kirk-session there, as Patrons and Trustees,
 for the Use and Behoof of eight poor, old, weak, and indigent Per-
 sons, heritably, and under *Reversion*, in Manner therein specified,
 all

all and haill the Lands therein and above mentioned, "cum decimis omnium dictarum terrarum, etc. Quæ quidem terræ arabiles, aliæque præscripta, cum decimis et pertinent. proprius hæreditarie pertinuerunt ad Jacobum Dunbar de Daleroß."

On this Charter Infestment followed, of this Date.

And the said Trustees did further, of this Date, obtain a Decree of Adjudication against the said *James Dunbar* of *Daleroß*, therein designed heritable Proprietor of the Lands, Tenements, and others underwritten, with the Pertinents, by which the foresaid Lands, called the *Millfield* or *Gallanuir*, half Coble Salmon-fishing on the Water of *Ness* and others, with the *Tiends* of the said Lands, and other Subjects therein mentioned, were adjudged from the said *James Dunbar*, and decerned and declared to pertain and belong to the said Trustees, and Successors in Office, for the Use and Behoof above written, heritably, in Payment and Satisfaction of the Sums therein mentioned.

In virtue of the foresaid Titles, the Kirk-session assumed full Possession of the Subjects recently after the Date of their Right, and they continued in the full Possession, without any Interruption from that Period, till lately, that they denuded themselves of their Right in favours of the Petitioner, who had Right by Progress to the Reversion from the foresaid *James Dunbar*, the Granter of the Wadset; and, during all that Period, they acknowledged no third Party as Titular of the *Tiends* of these Lands.

Several Years ago, a Process for augmenting the Stipend of *Incumbent*, and localising the same upon the Heritors, was brought at the Instance of the then Incumbents, and in the Year 1768, the augmented Stipend was localised upon the Heritors of the Parish, and this Locality being afterwards approved of, and an interim Decree extracted, the Ministers have accordingly uplifted their Stipend ever since, agreeable thereto.

Alexander Fraser of *Gallanuir*, who had expressly admitted, in these Proceedings, that he had no Right to his *Tiends*, thought proper, some time ago, to waken the foresaid Process, in order to a Rectification of the Locality, *quod* him, upon the Pretence that he had a Right to his *Tiends*; and having, in the Absence of the other Heritors, put his Lands extended, he obtained a Remit to the Clerk to make up a rectified or new Locality.

Besides the Property which the Petitioner, Mr. *Fraser*, had in the Parish, he, betwixt the Time of the foresaid Wakening and the

April 27,
1772.
Feb. 14th,
1771.

the making up of the rectified Locality, purchased from the Hospital their Right to the Lands of *Gallamuir* and *Millfield*; and, upon looking into this rectified Locality, his Agent discovered, that his own Property-lands had been overcharged in the old Stipend, and that the Lands of *Gallamuir* and *Millfield*, acquired from the Hospital, were loaded with a considerable Part of the augmented Stipend, while the Lands of several other Heritors within the Parish, which, by the former Locality, had been charged with a Share of the augmented Stipend, were altogether excoemed, notwithstanding that they had since produced no Right to their Tithes.

Upon what Ground or Authority this Exemption was made, the Petitioner has not hitherto been able to discover; and although this extraordinary Step was taken notice of in the Proceedings before the Lord Ordinary, yet, as the Petitioner's Doer apprehended, that the Right produced for the Petitioner was sufficient to excoem the Hospital, or him in their Right, from any Share of the Augmentation, he did not think it advisable to enter into a Litigation concerning the Exemption of those other Persons who had produced no Right, because, if the Petitioner had a Right to his Tithes, it was a Matter of little Moment to him, whether others having no Right, were exempted or not.

So soon therefore as this rectified Locality made its Appearance, which was no earlier than the 3d *February* 1767, the Petitioner, on the 7th of the said Month of *February*, objected against it, *1mo*, That his own Property-lands, to the Tiends of which he had an undisputed Right, were overcharged in the old Stipend; and, *2do*, That the foresaid other Lands, which he had lately acquired from the Hospital, could not be charged with any of the augmented Stipend, in respect he had an heritable Right to the Tiends of these Lands.

Upon the *first* of these Objections, the Petitioner, after an obstinate Litigation, maintained before the Lord Ordinary upon the Part of *Calduthill*, prevailed; but the Lord Ordinary was pleased to over-rule the 2d Objection.

The Petitioner thereupon reclaimed to your Lordships, and the Petition having been ordained to be seen and answered, Answers were put in accordingly; and the Petitioner having, in the mean time, recovered the foresaid Adjudication, which was obtained in

the 1711, but upon which no Infeftment had followed; and having founded upon it, as an exclusive Right to the Tithes, in regard that Tithes were a Subject that did not require an Infeftment, this produced an Enquiry into the State of the Tithes in this Parish, from which it indeed appears, that the Tithes of this Parish belonged to the Abbey of *Aberbrothock*, and that Lord *Pannure*, as Lord of Erection, stands infeft in the same. However, as the Points argued in the Petition appeared to be attended with some Difficulty, to your Lordships, of this Date, pronounced the following Interlocutor: "The Lords having again heard this Petition, with the Answers, they remit to the Lord *Kinnel*, Ordinary, to appoint Memorials to be given in upon such Parts of the Cause as he shall think proper, and that betwixt and the first Sederunt-day of *June* next."

March 21,
1768.

Dec. 7th,
1768.

And his Lordship having ordered Memorials accordingly, your Lordships were pleased, of this Date, to pronounce the following Interlocutor: "The Lords having advised the Petition for Mr. *Baillie* of *Lays*, with the Answers thereto for the Heirs of *Inverness*, mutual Memorials, and Writs produced, they refuse the Desire of the Petition, and adhere to the Lord Ordinary's Interlocutors of the 10th *July* and 5th of *August* 1767, and find the Respondents intitled to the Expence of extracting the Decree, in so far as relates to the Litigation occasioned by Mr. *Baillie* on his heritable Bond, and ordain Mr. *Baillie* to make Payment to them thereof accordingly, and decern."

Dec. 21st,
1768.

And the Cause having thereafter been inrolled in the Inner-house-roll, without making Avifandum by the Lord Ordinary, with the Locality, as altered by his Lordship's Interlocutor, in common Form, your Lordships, at the Calling of this Date, pronounced the following Interlocutor: "The Lords having advised the within Localities, and Report of the Lord Ordinary, with the Alteration thereupon, in so far as concerns the Lands which belong to the Hospital of *Inverness*, and the Lands and Fishings formerly *revested* to the Hospital, and now redeemed by Mr. *Baillie*, they approve of the Localities, with the said Alteration, and decern accordingly,"

The Petitioner hath laid the Cause again before your Lordships, and he humbly hopes, that, upon a Review, your Lordships will see Cause to alter these Interlocutors.

The Proposition which the Petitioner is humbly to maintain, is, that, as the Kirk-session of *Inverness* were infeft, in virtue of
the

the Titles above deduced, in both Lands and Tiends, as far back as the 1703, and as they entered to, and continued in the uninterrupted Possession of both Lands and Tiends, in virtue of their Infeffment, without any Demand having been made upon them by any Person claiming a Right to these Tiends beyond the Years of the long Prescription; that the Petitioner, as now in their Right, and who, at the same Time, is in the Right of the Reversion of the Lands and Tiends stipulated by the foresaid heritable Security, has a good heritable Right to the Tiends of his Lands by the positive Prescription.

Culduthill, in his Memorial to your Lordships, was pleased to dispute the Possession of the Petitioner's Authors. He says, it did not appear when they entered into the Possession, for that Allowance was given, in the Decreet of Adjudication, for some Annual-rents admitted to have been then paid, and Decreet was only taken for the Balance which was resting. It was then, for the first Time that their Possession was disputed. The Fact was notorious to the whole Country; and, accordingly, it was taken for granted, that the Petitioner's Authors had been in the uninterrupted Possession far past the Years of Prescription; and if it shall be still contested, the Petitioner is able and willing to bring a clear Proof of the Fact, so that, at present, the Relevancy can only fall under your Lordships Consideration, and your Lordships will judge of it in the same Light as if the Possession was already established by a Proof.

The Petitioner apprehends, that it is clearly founded, in the Statute 1617, that whoever shall continue in the Possession and Enjoyment of any Right, without Interruption, for the Space of forty Years, upon a proper Title, that the Party will thereby have an absolute Right in all Time coming, secured to him by the positive Prescription, although his Right flowed *a non domino*; and, therefore, supposing that the Right granted in favours of the Hospital had been absolute and irredeemable; although that Right, which, *quoad* the Tiends, is supposed to flow *a non habente*, would not have been good against the true Titular, if challenged within the Years of Prescription; yet after they, in virtue of their Infeffment, had continued to possess the same for the Space of forty Years, without any Challenge by the Titular, the Right would become absolutely good by the positive Prescription, and would be as effectual, as if *Dalcross*, the Granter of the Right, had been the real Titular.

And

And as this clearly holds in the Case of irredeemable Rights, so, the Petitioner humbly apprehends, that it will make no Difference, in a Question with the Titular, that the Granter had stipulated, in favours of himself, a Right of Reversion; because a Person possessed of a redeemable Right, is, to all Intents and Purposes, Proprietor, in a Question with every other Person than the Reverser, and his Possession will secure the Right, by Prescription, against all third Parties, as much as if the Title of his Possession had been that of an absolute Right of Property.

When a Person grants a Wadset of Lands that does not belong to him, and the Wadsetter takes Infeftment, and continues in Possession for the Space of forty Years, without any Challenge, the Right of every third Party is effectually cut off by Prescription, and the Right of the Wadsetter, subject to the Right of Redemption in favour of the Reverser, is secured by the positive Prescription. After forty Years Possession, in virtue of Charter and Seafine, without any Challenge, the Wadsetter cannot be disturbed on account of the supposed Want of Right in the Person of his Author.

Yea this Possession will not only secure the Right of the Wadsetter, but will likewise secure the Right of the Reverser. The Possession of the Wadsetter, with respect to every third Party, is, in the Eye of Law, the Possession of the Reverser; and the Right established in favours of the Wadsetter, by such Possession, would, upon Redemption, accrue to the Reverser: So that although the Granter of the Wadset was originally not Proprietor of the Subject, yet after the Wadsetter, in virtue of Charter and Seafine, has possessed the same, without Challenge, for the Space of forty Years, not only his Right of Wadset, but likewise the Right of the Reverser, with which the Wadset is burdened, will be secured by the positive Prescription; and, upon Redemption, the Reverser would become absolute Proprietor of the Subject, though originally he had no Right to it. This is plainly the Operation of Prescription by the Law of Scotland.

The other Party did not seem to dispute that this would hold in the Case of a proper Wadset, which was truly a Title of Property, though clogged with a Right of Reversion; but he was pleased to say, that the Right in question was a Wadset of no Kind, but a simple heritable Bond, or an Infeftment in Security of 2000 Mark; that the Property in this Case was not disposed; that Infeftment;

feftment is not taken in the Property; that it is a mere Incumbrance accessory to the personal Obligation to pay, which fell of course when the Debt was extinguished, whether by Payment or Intromission.

But, with all Submission, when the Nature of the present Right is duly attended to, the Petitioner humbly apprehends that it will be equally available to him in the present Question, as if it had been truly a proper Wadset. The Gentlemen may quibble as much as they please upon Words, but the Petitioner, until he is otherwise taught by your Lordships, will be pardoned to think that the Right in question, is truly of the Nature of an improper Wadset. The Clauses of the Deed have been recited to your Lordships at full Length, and your Lordships will from thence observe, that it is not of the Nature of an Infeftment of Annualrent, payable out of the Lands, which is only considered as a Servitude upon the Property, but that it contains a Procuratory for resigning the Lands and Tiends themselves, with all Right or Interest which he had therein during the Not-redemption; and accordingly, by the Clause of Reversion, the Tiends and Lands themselves are made redeemable from the Hospital by Payment of the said principal Sum of 2000 Merks, and what Part of the Annualrents thereof should happen to remain unpaid; and the Charter granted by the Superior, proceeding upon the foresaid Procuratory, (which, with the Infeftment thereon, is of itself a good Title of Prescription after forty Years) expressly disposes, confirms, and makes over, to the Trustees therein mentioned, both the Lands and Tiends, only subject to the Reversion therein specified.

It is indeed true, that as, by the Conception of the foresaid Deed, the Reverser is taken bound for the Interest as well as the principal Sum, it must follow of consequence that the Hospital was accountable for their Intromissions, and if their Intromissions exceeded the Interest, it might come to cut down the Capital; but the Petitioner humbly apprehends, that even this Circumstance can have no Influence upon the present Question, and that neither the Person who is said to be the true Titular, nor the Petitioner's Party, in this Cause, can avail themselves of it, but it is only competent to those who are in the Right of the Reversion, that is stipulated by the foresaid Deed.

In a Question betwixt the Reverser and the Wadsetter, there is a very great Difference betwixt a proper Wadset and an improper Wadset,

Wadſet, or a Right, by the Nature of which the Grantee is accountable for his Intromiſſion; but, the Petitioner is humbly adviſed, that, in a Queſtion with third Parties, there is no material Difference, betwixt a proper and improper Wadſet.—Even an improper Wadſetter, until he be denuded in favour of the Reverſer, is, in a Queſtion with third Parties, to be held as Proprietor, as much as in the Caſe of a proper Wadſet.—It is not competent for a third Party to found upon the Right of the Reverſer, or to alledge, that his Wadſet is extinguished by Intromiſſion.—The Reverſer could allow the Wadſetter to continue the Poſſeſſion as long as he had a mind. In like Manner, the Petitioner, in this Caſe, who is in the Right of the Reverſion, might have *diſcharged* the Reverſion altogether in favour of the Hoſpital; in which Caſe, the Property of both Lands and Tiends would for ever remain with them. They could not, in that Caſe, be called to account for their Intromiſſion, by any Perſon living, and after they, in virtue of their Charter and Sealine, had had the full Poſſeſſion and Enjoyment of both Lands and Tiends for above the Space of forty Years, it would not be competent for any Perſon afterwards to diſturb that Poſſeſſion, by alledging, that their Right flowed *a non habente dimiſſionem*.

If it was thus in the Power of the Reverſer to deprive the Titular of the Poſſeſſion of the Tiends as long as he pleaſes, or to render the Right of the Hoſpital unchallengeable, by conveying to them the Reverſion that was in him, it is not eaſy to conceive that the Right of the Titular ſhould be *better*, becauſe, inſtead of the Petitioner's diſpoſing his Right of Reverſion to the Hoſpital, the Hoſpital had *diſpoſed* their Right to the Petitioner.

If it be true, that the Titularity of theſe Tiends was in the Family of *Pannure*, and that, of conſequence, the Right granted to the Hoſpital *quoad* the Tiends, flowed *a non habente*, the Family of *Pannure*, in virtue of their Right of Property in the Tiends, could have diſpoſſeſſed the Hoſpital, without paying any regard to the Right they had derived from *Daleuſſi*; and, if the Family of *Pannure* had exerciſed that Right in due Time, poſſibly the Hoſpital might have been obliged to yield the Poſſeſſion; but the Petitioner does humbly apprehend, that, after the Hoſpital had, in virtue of their Charter and Infeſtment, peaceably poſſeſſed the Tiends, without Interruption, for above the Years of Preſcription, they come now too late. The Right granted to the Hoſpital is ſecured by the poſitive

positive Prescription, after which the true Proprietor cannot pretend to challenge *that* Right, as flowing *a non habente*, and it is as little competent for the Proprietor, or any third Party, to alledge, that their Right is extinguished by Intromissions; for they cannot be called to account, upon that Ground, by any other Person than he who is in the Right of the Reversion, that was stipulated by the Deed itself.

It was said, for the other Party, that the Petitioner, in this Case, could not avail himself of the Right acquired from the Hospital, because the Right of the Hospital was fully extinguished by a Discharge and Renunciation which they granted in favours of the Petitioner, and that, therefore, the After-disposition, which was granted by the Hospital, to the Petitioner, flowed *a non habente*.

But the Petitioner humbly apprehends, that this Argument is rather too thin to have any Weight with your Lordships. It would be a hard Case, if a Party was to be cut out of a Right, that was otherwise well founded, merely because a Mistake had been committed in framing the Deeds, that were proper to be granted, when that Mistake was immediately corrected, and new Deeds granted in proper Form.

The Discharge and Renunciation that was first taken in this Case, was entirely a private Deed betwixt the Hospital and the Petitioner, which had never been made use of, or put upon Record; and he knows no Right or Title that *Culduthill*, or any other Person whatever, has to found upon it. It is entirely *jus tertii* to them. There was nothing to hinder the Petitioner, if he had a mind, to have destroyed that Deed, or given it up to the Hospital; in which Case the Hospital would have been put in the same Situation they were in before granting of it; and as the Managers of the Hospital were Parties to the present Process, the Hospital could not have been burdened on account of these Lands for any Part of the Augmentation; and if so, the Petitioner apprehends, that the Conveyance which the Hospital granted in this Case, must be equally available to the Petitioner, as if the Discharge and Renunciation had never been granted.

When any one purchases a bankrupt Estate, under the Authority of the Court of Session, he is undoubtedly entitled to demand from the Creditors, upon Payment to them of their respective Proportions of the Price, a Conveyance to their Debts and Diligences, as a collateral Security to his Purchase. Put the Case, that the
Purchaser

Purchaser should, by Mistake, have taken from any of the Creditors a simple Discharge and Renunciation, but that, upon discovering his Mistake, he should afterwards procure a proper Conveyance to the Debt. If he should afterwards, in protecting his Purchase, have Occasion to found upon the Right of that Creditor, in a Question with any third Party, it would not be competent for that third Party to alledge, that the Purchaser had no Right to the Debt and Diligence of that Creditor, for that being previously extinguished by the Discharge and Renunciation, the Disposition flowed *a non habente*. The Answer, with Submission, would be good, that the Objector had no Title to found upon that Discharge; that it was a private Transaction betwixt the Purchaser and Creditor, which they could undo at pleasure, and that the Disposition afterwards granted by the Creditor, would convey the same Right to the Purchaser, as if the Discharge had never existed; and the same Answer is, with Submission, sufficient to remove the Objection that is urged in the present Case.

The Petitioner therefore apprehends, that he has an undoubted heritable Right to the Tiends of the foresaid Lands, as having effectually been consolidated with the Stock, by the Force of the positive Prescription, even although *Dalrymple* had formerly no Right to the Tithes;—and that, therefore, no Part of the augmented Stipend can be laid upon these Lands, there being great Sufficiency of free Tiends within the Parish.

But, *2.^{do}*, Your Lordships will observe, that, by the foresaid Interlocutor, the Petitioner is found liable in “the Expence of extracting the Decreet, in so far as relates to the Litigation occasioned by the Petitioner, on his heritable Bond.” The Petitioner humbly hopes, that, upon re-considering the Case, your Lordships will see no just Cause for loading the Petitioner with that Expence, even although you were to adhere to the Interlocutor upon the Point of Right, which the Petitioner humbly apprehends will not be the Case. The Plea maintained before your Lordships was not a Question of Fact, but a Question of Law; and, with all Submission, he cannot consider the Question to be so clear against him, as that he should be loaded with any Part of the Expence of Process, for submitting it to the Consideration of the Court: And this he may be allowed to say, with some Degree of Confidence, because, when the Cause was laid before your Lordships, on Petition and Answers, it appeared to be attended with so much

13

much Difficulty, that it merited an additional Memorial, and which was ordered and given in accordingly.

The other Party was pleased to take great Offence, because, in the Papers given in to your Lordships, the Petitioner had called the foresaid Deed granted by *Dalcrofs* to the Hospital, a *Wadset*; but surely that could not enter into your Lordships Consideration, in finding the Petitioner liable in these Expences. The Petitioner did indeed say, in his Petition, that the Deed in question was of the Nature of an improper Wadset; and, until it is found otherwise by your Lordships, he will be pardoned to think so still: But, be that as it will, it is surely a Circumstance of no Moment; because, at the same time that he gave it the Name of an *improper Wadset*, the Clauses of the Deed were laid before your Lordships, at great Length, in the Petition; and, therefore, the Petitioner could never mean to mislead the Court by *Names*, when the Thing itself was before your Lordships.

It was likewise observed, on the other Side, that the Petitioner had procured the Disposition he now founds upon, during the Dependence of the Question. But the Petitioner, with Submission, cannot find that there was any thing faulty in his Conduct in that Particular. The Process, to which the Managers of the Hospital; as well as the Petitioner, were Parties from the Beginning, has depended a considerable Time before the Court; and it was during the Dependence of the Process that the Transaction itself with the Hospital was entered into, and that the Discharge and Renunciation was obtained.—The Transaction was executed by the Petitioner in the Country; but having been afterwards told that it was wrong executed, and that a Disposition ought to have been taken, in place of a Discharge and Renunciation, the Mistake was rectified accordingly. A Discharge and Renunciation in favour of the Petitioner, could never extinguish the publick Infestment upon the Charter in favour of the Hospital; besides, it was never produced in Process, but was immediately returned, when the Mistake was discovered: So that it is impossible to conceive what Difference this Circumstance can make in the Argument, when that Renunciation was not only inept, but never made use of or had taken Effect, by being recorded in terms of Law.

Indeed, it would not have altered the Merits of the Question, although the Transaction had not been entered into at all, but that the Right had been allowed to remain with the Hospital. The Petitioner humbly apprehends, that, as long as there remained free

Tiends within the Parish, *no Part* of the foresaid Lands, could be evicted from the Hospital, and allocate for the Minister's Augmentation, when the Hospital had been in the constant and uninterrupted Possession of those Tiends, along with the Stock, in virtue of Charter and Seafine, above the Years of Prescription. And if the Hospital, after they had thus acquired a Right by their Possession, could not have been liable to the present Augmentation, it does not occur that the Petitioner, who is now in their Right, can be in any worse Case.

It only remains to be observed, that, at any rate, your Lordships Interlocutor, of the 21st *December* last, will fall to be altered, in so far as it approves of the Localities, with respect to the following Persons; as, by that Interlocutor, Mr. *Duff* of *Drumair*, *Thomas Frazer* Smith, *Donald* and *Naomi Cutberts*, Lieutenant *David Grant*, the Representatives of *James Kinnaird*, *John Frazer*, *William Frazer* Town-clerk, *Simon Frazer* Merchant, *James Frazer* Smith, and *William Grant* senior Wright in *Inverness*, are excemed from any Share of the augmented Stipend, although they stand expressly charged with a Proportion of the Augmentation in the former Localities, and no Rights to their Tithes have been since produced.

*May it therefore please your Lordships, to alter the fore-
said Interlocutors, and to find, That the Petitioner,
in virtue of the Titles above deduced, and forty Years
Possession, has an heritable Right to the Tiends of the
foresaid Lands; and, in case the Possession shall be
controverted, to allow the Petitioner a Proof thereof;
and, at any rate, to find no Expences due, and
to recall your Interlocutor of the 21st December last,
approving of the Locality, in so far as the Persons
above named are thereby excemed from any Share of
the augmented Stipend, and remit to the Lord Ordina-
nary to proceed accordingly.*

In respect whereof, &c.

RO. MACQUEEN.

This Petition refused without Answers

Unto the Right Honourable the Lords of Council and Session;

T H E
P E T I T I O N
O F

David Threipland, eldest lawful Son, procreate betwixt *Stewart Threipland* of *Fingask*, Esq; Doctor of Medicine, and *Janet Sinclair*, his Spouse, lawful Daughter of the deceased *David Sinclair* of *Southdun*, his first Wife, and the said *Stewart Threipland*, as Administrator-in-law for him; *Katharine Sinclair*, also lawful Daughter of the said deceased *David Sinclair*, his second Marriage, *Henrietta*, *Janet*, *Amelia*, and *Margaret Sinclairs*, Children procreate betwixt *James Sinclair* of *Harpsdale*, and the deceased Mrs. *Marjory Sinclair*, also Daughter of the said *David Sinclair* of his second Marriage, and their said Father as Administrator-in-law for them, and *Margaret Sinclair*, the youngest Daughter of the said *David Sinclair*, by his third Wife, Defenders,

Humbly sheweth,

THAT *James Sinclair* of *Lyth*, Clerk to the Bills, died upon the 20th *February*, 1722; possessed of a considerable Estate, partly heretable, partly moveable, all of his own Acquisition.

A

James

James Sinclair had no Issue, and being the middle of three Brothers, *David Sinclair* of *Southdun*, the Son of his immediate elder Brother, was acknowledged by him to be his Heir.

Thus Matters stood when *James Sinclair* was seized with that Distemper of which he died in a few days.

David Sinclair of *Brabsterderan*, *James's* immediate younger Brother, and Heir of Line, assisted by his Son *David Sinclair*, the younger, taking Advantage of his Nephew, *Southdun's*, Absence, and of the weak State and Condition to which his Brother *James* was then reduced, laid hold of that Opportunity to accomplish that Scheme which they had long projected, but which they could not effectuate while *James Sinclair* was in *habeas corpus*, of eliciting from him upon the 14th 16th and 17th Days of *February*, in said Year 1722, a Variety of Deeds, which if they could have been supported would have evicted the whole Estate from *Southdun*, the right Heir.

There was no Possibility of ante-dating these Deeds, because they were of such a Nature, that *James Sinclair*, in the weak State and Condition to which he was then reduced, was incapable to write them with his own Hand, so that a Writer and instrumentary Witnesses behoved of Necessity to be adhibited; which therefore behoved to stand the Chance of *James Sinclair's* out-living the 60 Days, which was not very likely to happen, as in Fact he died the 3d Day thereafter; but, anxious to secure something in all Events, it occurred, to take a Bill from the poor dying Man for a large Sum, to which they could affix any Date they thought proper.

A Bill was accordingly made out, of the Hand-writing of *David Sinclair*, the younger, for no less a Sum than 6000 *l. s. 1s.* and was made to bear Date the 18th *October*, 1721, though he chose to take the Bill rather in his Father's Name, than in his own.

James

James Sinclair was in such opulent Circumstances, that it was quite inconceivable, what occasion he could have to borrow this Sum from his younger Brother, who at no Time of his Life, was ever possessed of, or in condition to lend so large a Sum, and though the Bill was made to bear Date the 18th *October*, 1721, that is 11 Months prior to *James Sinclair's* Death, no Mortal ever heard of it till after his Death, and to this Hour, no Account can be given, either by what Means *David Sinclair* should have been possessed of so large a Sum, or what occasion *James Sinclair* could have had to borrow the same.

But, as these dark Operations generally come to light, in one Shape or other, it came to be reported, and was universally believed, that when this Bill was presented to *James Sinclair*, then in *extremis*, to be by him signed, it was wrote out in such a hurry, that it bore neither Place nor Date, nor the Creditor's Name, nor the Subscription of the Drawer, and that it was not till after *James Sinclair's* Death, that *David Sinclair* the Son, presented said Bill to his Father *David Sinclair* the elder, and caused him adhibit his Subscription thereto as Drawer, and at the same time to indorte it Blank.

The various other Deeds, which had been elicited from *James Sinclair*, upon Death-bed, made it necessary for *South-dun* to challenge these, by a Process of Reduction and Improbation, and this Bill of 6000 *l.* was included in that Challenge, upon the several Grounds above stated, and having obtained an Act before Answer, a most distinct Proof was brought, that all the other Deeds challenged were granted upon Death-bed, and they were accordingly all reduced, a Circumstance not extremely favourable for the 6000 *l.* Bill; but as that Bill, of whatever Date it shall be supposed to have been, had been taken *remotis arbitris*, of the Hand-writing of *David Sinclair* the Son, though in Name of his Father, it was impossible

impossible to prove by Witnesses, the true Date of that Bill.

And therefore it was, that at a Calling before the Lord Ordinary, in *February*, 1729, *Southam* stated his Reasons of Reduction of said Bill, and in support of these, he exhibited the following Condescendence of Facts, which he offered to prove by the Oath of *David Sinclair* the elder, the alledged Drawer.

Condescen-
dence

1st, That he never had any Communing with the deceased *James Sinclair*, on or before the 18th *October*, 1721, the pretended Date of said Bill, concerning *James Sinclair's* granting a Bill to him for that Sum.

2^{dly}, That he paid no Money, nor gave any valuable Consideration to *James Sinclair* for granting that Bill.

3^{dly}, That said Bill was not signed by him as Drawer, at or before Signing the Acceptance, or any Time before *James Sinclair's* Death.

4^{thly}, That said Bill was not delivered to him, before *James Sinclair's* Death, and that he did not see or know said Bill before *James Sinclair's* Death.

5^{thly}, That sundry Words, which then appeared upon the Face of said Bill, were not there when the Bill was first shown to him, particularly the Words *dear Brother*, and these other Words *your Brother and humble Servant*, but that these had been added since *James Sinclair's* Death.

6^{thly}, That it was consistent with his, the said *David Sinclair's* Knowledge, that said Bill was not accepted by the said *James Sinclair* upon the 18th *October* 1721, and that, when the Bill was first shown to him, it did not bear the above Date prefixed to it; that the Bill was of the Hand-writing of the said *David Sinclair's* Son, and was presented to him by his Son after *James Sinclair's* Death, that he might sign, both as Drawer and Indorser, at the same time.

Feb. 4,
1729.

The Lord Ordinary, by Interlocutor of this Date, 4th *February* 1729, " Found the above Facts relevant to be proven
by

“ by *David Sinclair*’s Oath, and, in respect, that his Council declined to take a Day for his deponing, or a Commission, held him as confessed thereon, reduced and decerned.”

The Relevancy of this Condescendence was undeniable. And as here, in the very outsetting, your Lordships perceive *David Sinclair*, by his Council, without any Cause assigned, refusing to take a Day, either for producing him to depone, or a Commission for that Purpose ; so, in the after Progress, you will have Occasion to see the various Stratagems and Devices that were practised to avoid his being obliged to depone upon this Reference of Facts, plain and simple, all consistent with his proper Knowledge, unquestionably relevant, the Mean of Proof, by his own Oath, and a Commission agreed to.

Against this Interlocutor a Reclaiming Petition was however presented; in name both of Father and Son ; upon advising of which, with the Answers thereto made, your Lordships, by Interlocutor of this Date, “ Found, that *David Sinclair*,^{Feb 5} who was Creditor in said Bill, ought to depone as to the 1729. “ Verity of the Date of the Bill ; and as to the true Cause “ thereof, and the Time of his signing the same; and the other Articles of the Condescendence, or otherways held him “ as confessed, and remitted to the Lord Ordinary on the “ Bills, in Time of Vacation, to grant Commissions, if desired.”

It required no small Degree of Ingenuity to discover any thing in this Interlocutor to furnish a Pretence for delaying to extract the Act and Commission ; but so it was, that the Extract was delayed that whole Vacation, and, till the 13th June, next Session, when a Petition was presented in name of *David Sinclair*, the younger, praying an Explanation, whether it was him or his Father that your Lordships intended should depone, and according as it should be explained, to grant Commission.

B

A more

A more frivolous Pretence than this cannot possibly be conceived, calculated for no other earthly Purpose but to gain so much Time, in the View that *David Sinclair*, the Father, who was then in a valetudinary State of Health, might, in the mean time, happen to die ; for, as the whole of the Articles referred to Oath were the proper Facts of *David Sinclair*, the Father, whereby, amongst other Particulars, the true Date of the Bill, the true Cause thereof, the Time of his subscribing the same as Drawer, were referred to Oath, where could the Doubt be, that it was him, the Father, not the Son, though of the same Name, that your Lordships intended should depone ? it was the Father whom the Lord Ordinary had found should depone ; it was by his Oath only the Facts were probable, was it not then trifling with your Lordships in a most unbecoming Manner to make the Identity of the Names of Father and Son the Pretence of delaying the Act and Commission for near the Space of four Months, upon an affected Doubt, whether your Lordships intended the Father or Son should depone. Had your Lordships then refused to repone him against the Circumduction, or to have granted any longer Time for his deponing, he could with no Reason have complained.

June 24.
1729.

But as the Renewal of the Act and Commission was not opposed upon the Part of *Southam*, in full Confidence, that *David Sinclair*, if brought upon Oath, would have confessed the whole Truth of these Facts, your Lordships, by Interlocutor of this Date, “ remitted to the Lord Ordinary to circumduce the Term against the said *David Sinclair*, Elder, with “ Power to prorogate the Commission formerly granted, to the “ 20th *July* ; but with this Declaration, that if the said *David Sinclair* should die before deponing, the Circumduction “ should stand, and he be held as confessed.”

June 27th.
1729.

Accordingly, the Lord Ordinary, by Interlocutor, of this Date, “ circumduced the Term against *David Sinclair* elder, “ for not deponing, and held him as confessed, and decerned ; “ but

“ but in case he should yet incline to depone, renewed the
 “ Commission formerly granted to him, to for taking
 “ his Oath, in terms of the Act, and that at the
 “ Day of *July* then next, to be reported on the 20th of said
 “ Month of *July*; and in terms of the Lords Interlocutor,
 “ in Presence, declared, that if the said *David Sinclair* should
 “ die before deponing, that the Circumduction should stand,
 “ and he be held as confessed.”

It was impossible, in the direct Way, to shift or postpone this Reference to Oath any longer; some other Device, therefore, must be fallen upon, to accomplish that End; and, as *David Sinclair* the younger had taken upon him the whole Conduct and Management of the Defence, and as Indorsee by his Father, stood nominally in the Right of this Bill, he preferred a summary Petition and Complaint in his own Name, to your Lordships, upon the 26th *June* 1729, charging *Southdun* with an alledged Battery committed upon him, *pendente lite*, in which, if he should prevail, the Consequence would be an Absoluture from the Reduction, during the Dependence of which the Battery was said to have been committed, and he so far prevailed, that he obtained an Act for Proving; but when the Proof came to be advised, it appeared clear to your Lordships, that it was a Squabble of his own Procurement, and in which he was the Aggressor, with a sinistrous View to take Advantage of it in the Way he was attempting, the Result of which, therefore, was a Judgment acquitting *Southdun*.

This, however, had so far the desired Effect, that it stopped any further Proceedings in the original Cause for about eighteen Months; and, at an after Calling, of this Date, *David Sinclair* obtained a further Prorogation of the Jan. 15th, Term, and a Commission for his deponing, to be reported 1731. the 15th *February* thereafter, but qualified with the same Condition as in the former Interlocutors.

Against

Against this Interlocutor, *David Sinclair* again represented, that the Time allowed for his deponing was too short, where-
 Feb 17th, 1731. upon the Lord Ordinary, prorogated the Time for reporting "*David Sinclair's* Oath to the 1st *June* then next, under the same Quality, as in the former Interlocutors, in case of his dying in the mean time."

And as, from the foregoing State of Facts, and Procedure, it cannot have escaped your Lordships Observation, what Arts and Devices *David Sinclair* the younger appears to have practised, to prevent his Father's being brought upon Oath, in the View and Expectation of his dying in the mean time, from the valetudinary State of Health into which he is said to have fallen, his after Conduct will appear to be of a piece.

David Sinclair the elder died upon the 1st *May* 1731, without deponing, and as *Southdun* met with no further Disturbance, he did not extract his Decreet of Circumduction, sooner than the 13th *June* 1736.

July 28th, 1736. A Petition was thereupon presented in Name of *David Sinclair* the younger, complaining that the Decreet of Circumduction had been improperly extracted, in regard that the Execution of the Act and Commission for taking *Southdun's* Oath, had been prevented by *Southdun* himself, for Evidence of which there was produced an Instrument of Protest, dated 17th *April* 1731, under the Hands of *Benjamin Doull*, Notary-publick, taken against *Southdun* personally.

This Instrument did in Substance set forth, "That the Day preceeding, being the 16th, this Notary, as authorized by a Mandate from *David Sinclair* the elder, had presented to the two Commissioners, *James Budge* of *Tostingall*, and *James Campbell* Sheriff-clerk of *Caithness*, an Act and Commission, granted by the Lords of Session, for taking the Oath of the said *David Sinclair*, upon the Points thereby referred; that both Commissioners had accepted of the Commission, and said that they would attend any Day for
 "executing

“ executing thereof that *Southdun* should name; that on the
 “ said 17th, the said Notary-publick had repaired to the per-
 “ sonal Presence of *Southdun*, and, after relating to him
 “ what had passed in the preceeding Day's Conference with
 “ the two Commissioners, did require *Southdun* to appoint a
 “ Day for taking *David Sinclair's* Oath without Delay, be-
 “ cause he was then valetudinary, and in a bad State of
 “ Health; that to this *Southdun* made answer, That the Act
 “ could be examined, and *David Sinclair's* Oath taken, up-
 “ on any lawful Day of *April* current, or *May* next; that
 “ he could not then instantly condescend upon any particu-
 “ lar Day for that Purpose, but that he and the Commis-
 “ sioners would attend upon some lawful Day in *May*, whereof
 “ he would acquaint the saids *David Sinclairs*, elder and
 “ younger, some Time before; that to this *David Sinclair* the
 “ younger replied, That, as by the Act it was declared, that,
 “ if *David Sinclair* the elder died before deponing, the Cir-
 “ cumduction should stand, and as he was in so bad a State
 “ of Health, that it was believed by all that saw him, he
 “ could not live long, therefore insisted, that *Southdun* might
 “ appoint *Monday* or *Tuesday* next for taking his Father's Oath,
 “ in terms of the Act; that *Southdun* still repeating his for-
 “ mer Answers, *David Sinclair* younger further represented,
 “ That *Southdun's* postponing his Father's Examination might
 “ be with a view that he might die before deponing, and
 “ therefore protested, that, as *David Sinclair* elder was ready
 “ to depone, and that the Commissioners are willing to attend
 “ to take his Oath any Day that *Southdun* should name, and
 “ as *Southdun* nevertheless postpones the naming of any Day,
 “ albeit *David Sinclair* the elder is dangerously indisposed;
 “ in case he shall happen to die before deponing, he may not
 “ be held as confessed upon the Articles of the Condescen-
 “ dence.”

This Instrument, which in the Sequel shall be shown to be
 false in all the material Articles, is signed by the Notary and

two Witnesses, *Alexander* and *John Sutherlands*, as specially required *thereto*, in regard that instrumentary Witnesses to Protests of this Kind, do not only attest the Subscription of the Notary, but the Truth of the Facts asserted in that Instrument, which therefore requires their personal Presence at the Time, and Knowledge of the Facts which they so attest.

And, upon a general View of the Conduct of both Parties, antecedent to this Time, as your Lordships have seen *Southdun*, from first to last, anxiously pressing to have *David Sinclair's* Oath taken upon the Facts referred to him, from the Difficulty he foresaw there might be in the Proof of some of these Facts, in case of *David Sinclair's* Death; and as, on the other hand, you have seen *David Sinclair* the younger, using all his Address to prevent and postpone his Father's being brought to depone, which had the Effect to delay the same for upwards of two Years, it is humbly submitted, how improbable it is that *Southdun*, when thus required to appoint a Day for taking *David Sinclair's* Deposition, in respect of his then dangerous State of Health, should have refused the same, thereby to deprive himself of the only Mean of Proof he had been so long struggling for, upon the vain and groundless Expectation that the Circumduction against *David Sinclair*, for not deponing, would be held fast, when he himself was the occasion thereof; or whether, *e contra*, it is not much more presumable, that *David Sinclair* the younger had afterwards bethought himself of this Stratagem, and cooked up the aforesaid Instrument, to furnish a Handle for the Use that he now makes of it.

For though there is a *talis qualis* Evidence, that *David Sinclair* did, upon the 16th, notify to the Commissioners, at least to one of them, that an Act and Commission, to the above Purpose, was issued, and gave the like Notice to *Southdun*, upon the 17th; it is so far from being true, that he either required the Commissioners to appoint a Day for taking his

his Father's Oath, or, that they, in answer thereto, referred it to *Southdun* to name the Day, or that *Southdun* was required to name the Day, and shifted the same in the way and manner set forth; that, on the contrary, it appears, the whole is an absolute Fiction, hatched and devised by young *David Sinclair* and the Notary.

Southdun put in his Answers to the foresaid Petition, denying all the material Facts set furth in that Instrument, and disputing the Relevancy, supposing all that was alledged to true.

David Sinclair thereupon intended a Reduction of the abovementioned Decreet of Circumduction, and, after some intermediate Steps, unnecessary to be stated, he obtained a Remit to the Lord Ordinary to hear Parties Procurators as to the Regularity of the Extract of the Circumduction, but as he appeared to be equally backward in pushing on this Process, and rather to keep it alive than to bring it to a Conclusion, *Southdun* was obliged to inrol the Cause, when *David Sinclair* not chusing to appear, he suffered Decreet to pass in Absence, finding the Decreet of Circumduction regularly extracted, assioilyzing from the Reduction, and dismissing the Petition so far as it complained thereof. 18th Jan.
1738.

But as this Interlocutor was thereafter laid open, upon a Representation, so, from the 1st of *February* 1738, till the 1750, the Process was allowed to sleep; a Circumstance not extremely favourable, when a Claim for so large a Sum was, without any visible Cause, abandoned, and given up for such a Course of Years, and, there is reason to believe, would have remained in that dormant State to all Eternity, had not *Southdun*, who did not chuse to leave a Claim of this Kind hanging over his Childrens Head, caused waken the Process; and having obtained a Remit to Lord *Woodball*, in place of the former Ordinary, the Pursuer was at length pleased to exhibit a Condescendence of Facts, which he put to *Southdun* to confess or deny,

deny, though they contained not a Word more than was set forth in his Instrument of Protest.

To these *Southdun* made special Answers, negative as to all the material Points, and more particularly, he thereby positively denied that he either knew or was told of *David Sinclair* the Elder's being in immediate Danger, or that the Notary had, the Day before, applied to the two Commissioners to appoint a Day to execute the Act and Commission, or of the alleged Answers made by the Commissioners.

20th July,
1753.

Parties differing so widely in the State of Facts, the Lord Ordinary, by Interlocutor of this Date, allowed to both Parties a Proof of their several Allegations. The Proof was accordingly taken, and a State thereof made ready for preparing, but as *David Sinclair*, from thence forward, never moved one Step to have the State finished, and the Proof advised, though he lived several Years thereafter, he was supposed to have dropped the Process entirely.

21st July,
1751.

But after the said *David Sinclair's* Death, the now Pursuer, his Son, was pleased to take up the Cause, where his Father had left it, and having obtained a Remit to Lord *Barjarg*, the Cause went on but heavily.

24th ditto.

The regular Method of Procedure upon this Remit would have been, that Council should have been heard thereon before the Lord Ordinary; but, as this was neglected, the first Account the Petitioners heard of the Matter was an Interlocutor, *ex parte*, in the following Words: "The Lord Ordinary
" having considered the Proof adduced, and Remit by the
" Lords, finds it proved, that the Act and Commission was
" duly intimated to *Southdun*, and to the Commissioners there-
" in named, and Requisition made to them to have the Oath
" of *David Sinclair* taken before the Commissioners within
" some short Time, which was refused by *Southdun*, and that
" *David Sinclair* died of the Indisposition he then laboured
" under before the first *June*, and that his Oath was thereby
" lost

" lost by the Fault of *Southdun*, that the Decreet of Circum-
 " duction was therefore improperly and wrongously extract-
 " ed by him, and therefore finds the same reducible, and
 " reduces, decerns and declares, in terms of the Libel."

As this Judgment was very unexpected, and pronounced
 so near the End of the Session, that there was scarce Time to
 lay it fully before your Lordships, a very short Representation
 was presented, chiefly with a view to lay it over till the Be-
 ginning of the Winter Session ; but the Lord Ordinary was
 pleased, by Deliverance thereon, to refuse the same, supersed-
 ing Extract till the 20th November. Aug. 6th,
1767.

† The Petitioners taking Advantage of that Delay, stated the
 Case more fully to the Lord Ordinary, whereby they not on-
 ly disputed the Proof, but the Relevancy of those Facts upon
 which the Pursuer seemed to rely ; but, upon advising said
 Representation, with the Answers, his Lordship was again
 pleased, by Interlocutor of this Date, to refuse the Desire of
 the Representation, and to adhere to his former Interlocu-
 tor. Dec. 10th,
1767.

Of these Interlocutors the Petitioners humbly pray your
 Lordships Review, and will, in the Sequel, take occasion to
 examine both the Relevancy and Proof.

And, to begin with the Relevancy, allowing, for Argu-
 ment's sake, all that is alledged by the Pursuer to be true,
 the Petitioners will be pardoned to say, that they do not per-
 ceive how the Consequences will follow ; it was *David Sin-
 clair* that was to depone ; it was to him the Act and Com-
 mission was granted ; it was his Business therefore to advert
 to the proper Execution thereof ; and, if it could be believed,
 that the Commissioners, when applied to name a Day for tak-
 ing *David Sinclair's* Oath, had, out of Compliment to *South-
 dun*, left the particular Day to his Nomination ; and that
Southdun, when informed thereof, and of the Necessity of
David Sinclair's being quickly examined, because of his In-
 disposition, had shifted and delayed to name the Day, there

D

was

was the stronger Reason for *David Sinclair's* taking some more effectual Measure to have the Commission executed, and not sitting with his Arms across during the whole Residue of the Time ; he ought at any rate to have reported to the Commissioners *Southdun's* Refusal to fix a Day, and required them to appoint the Diet ; that was their Province, not *Southdun's* ; so far to the contrary, that, after the Commissioners had appointed the Day for Examination, Intimation thereof behoved to be made to *Southdun* ; and if, by means of his Neglect, the Term for deponing was suffered to elapse, and the Mean of Proof lost by *David Sinclair's* Death, it can scarce be a Question where the Blame should lie.

And how is it possible to believe, that if *David Sinclair*, the Younger, who had all alongst been so intent to protract his Father's deponing, had now become so zealous to have his Oath taken, knowing the Circumduction to stand against him, unless he did depone that he would have rested satisfied with this supposed Off-put from *Southdun*, without ever acquainting the Commissioners thereof, or applying to the Commissioners, who he says were so extremely willing to take the Examination.

But allowing this also to pass, let it next be considered what Proof there is of the Pursuer's capital Averments, consisting of the following Particulars : 1st, That *Southdun* was in the Knowledge of *David Sinclair*, the Elder's dangerous Indisposition. 2^{dly}, That, upon the Act and Commission's being intimated to the two Commissioners, they agreed to act, but allowed *Southdun* to appoint the Day. 3^{dly}, That this Compliment from the Commissioners was notified to *Southdun*, and Requisition made to him to appoint a Day, which he refused to do. and put it off, with the frivolous Answer stated in the Instrument of Protest.

If these Facts are not proved, or if any one of them is disproved, the Pursuer's whole Plea must fall to the Ground ; that the bare Instrument of Protest, unsupported by the Oaths of the Notary and Witnesses, or other extrinseck Evidence,

dence, is no Proof, will scarce be disputed; and as the Pursuers cannot be supposed to have been ignorant of this, his forbearing to move one Step of the Matter, till the Notary and one of the instrumentary Witnesses were dead, is another very suspicious Circumstance, and reduces the whole Proof that has been attempted on the Pursuers part, within a very narrow Compass.

It is known to your Lordships by repeated Experience, what Liberties are taken in those remote Parts by Messengers and Notaries, in procuring Witnesses to adhibit their Subscriptions to their Executions or Instruments of Protest, when they were not present at the Place or Time when these Things are said to be done, and know no more of the Matter than the Child that is unborn.

A stronger Instance of this cannot be figured than what occurs in the present Case, as it comes out on the Testimony of *John Sutherland*, the only instrumentary Witness alive, and the more to be credited, that, however ignorantly he may have been drawn into this Scrape, trusting to the superior Skill of the Notary, he is confessing Guilt against himself, for which his Ignorance of the Law would be no Protection.

This Witness being shown the Instrument of Protest, fairly acknowledged its being his Subscription, but at the same time confessed, "That he did not hear one Word of what was therein contained read, nor did he read it himself, to the best of his Knowledge; that he does not remember at what Time or Place he did subscribe it, or whether before or after *David Sinclair* the elder's Death; and depones, that he neither saw the Pursuer take an Instrument in the Notary's Hands against *Southdun*, nor did he hear what they said, as he was then standing at the Gavel of *Southdun's* Kitchen, a considerable Distance from where they were." And further adds, "That he signed that Instrument at *Benjamin Doull's* Desire, but did not know what it contained." If this Witness is to be credited, and the Pursuer surely will not

not dispute the Credibility of his own Witness, he is so far from astructing the Instrument, that he proves it to be a forged Deed, in fabricating of which, very undue Practices seem to have been used.

Thomas Bremner, the Notary's Servant, but who was not proper to be an instrumentary Witness, because he could not write, gives an Account of a Meeting between the Pursuer, *Southdun*, and the Notary, on a Ley Field below *Southdun's* House, and in so far seems to concur with the former Witness, and depones, " That he saw the Pursuer have a
" Paper in his Hand, about the Bigness of the present Act
" and Commission (well remembered at the Distance of thirty-
" four or thirty-five Years) and, to the best of his Remem-
" brance, thinks it was about taking the Pursuer's Father's
" Oath, that he saw the Pursuer take Instruments in his
" Master, the Notary's Hands, and required *John Sutherland*
" (the former Witness) and another *Sutherland*, whom he
" does not know, to be Witnesses at taking the Instru-
" ment."

What this Witness has deposed, in the above Particulars, is flatly contradicted by *John Sutherland*, the instrumentary Witness, who swears positively, " that he was neither desired
" by the Pursuer or Notary to be a Witness to the taking
" the Instrument taken, nor was he so near as to hear what
" passed between them."

The same Witness (*i. e.* the Notary's Servant) proceeds to give Account of his going with the Pursuer and his Master, the Notary, to the House of the two Commissioners, and
" saw that Paper which his Master presented to *Southdun* in
" his Master's Hands, and believes the Business was to inti-
" mate that Paper to the Commissioners; but as he had not
" Access to go up Stairs in the Gentlemens Houses, he did
" not see that Paper intimated to them, but heard it was in-
" timated." This Part of the Oath is a Curiosity; if the In-
strument itself is to be credited, the Act was intimated to
the

the Commissioners upon the 16th, and to *Southdun* upon the 17th, referring to the alledged Conference with the Commissioners the preceeding Day; but this Witness, ignorant and illiterate as he appears, swearing to a Fact more than thirty Years old, makes the Visit to the Commissioners to have been posterior to the Visit to *Southdun*, and judges it to have been the Act and Commission shewn to him at deponing, because it was much of the same Size, but as he was not allowed to go up to the Commissioners in their private Apartments, he knows nothing of what passed in private.

But the Matter does not rest upon the Evidence of these two Witnesses; for you have the Oath of *James Campbell*, one of the Commissioners, who depones, that he does not remember of the Act and Commission's being intimated to him, nor any thing about said Act and Commission; nor can this be deemed a mere *non memini*; for, if any such Act and Commission had been presented to him, and he required to appoint a Day for executing the same, which he had shifted or declined, it is scarce to be imagined, that so material a Circumstance, in that Part of the Country, would have passed without Observation; so that it is at least as strong a *non memini* as can well be supposed.

James Budge of Toftingall, the other Commissioner, goes so much further as to say, that the Pursuer and Notary came to his House, and intimated to him the Act and Commission; that he neither remembers of his being required to appoint a short Day for executing the same, because of the Pursuer's Father's Indisposition, nor of the Answer he is said to have made. This is the whole of the Proof respecting this Article; and, when the whole Case is taken under Consideration in one complex View, the Petitioners flatter themselves, that your Lordships will be satisfied of the Insufficiency and Falsity thereof in every Article; particularly of the Requisition said to have been made, both to the Commissioners and *Southdun*,

to have a short Day fixed for executing the Act, in respect of *David Sinclair's* Indisposition, and the Answers they are severally said to have made thereto.

The abandoning of it for so many Years, till *Southdun* wakened it, shows what Opinion *David Sinclair* had of it. It would not hurt the Cause, were the Petitioners to admit, that the Act and Commission had been notified both to *Southdun* and the Commissioners, unless it had also been proven, that they were both required to take *David Sinclair's* Oath, and refused to comply; but nothing of this is so much as alledged, so far as regards the Commissioners, and it is disproved, so far as regards *Southdun*, as the one would not be true, if the other was false.

The Pursuers are pleased to lay Stress upon the Mandate given by the Father to make this Requisition; but this is plainly of a piece with the rest of the Cookery of *David Sinclair* the Son: He behoved to be possessed of the same Materials for making this fictitious Requisition, as if it had been a real one; and, in this View, he prevails with his Father to sign the Mandate, to be used or not as Occasion should afterwards require, and he proceeds so far as to notify, that he had such an Act and Commission; but, that he made such Requisition as has been alledged, is not only not proved, but disproved, though this is the Hinge of the whole; and therefore, though the Petitioners cannot admit that any such Requisition was made, or Answer given, they greatly doubt whether it would be relevant, as it was the Province of the Commissioners to appoint a Day; so that upon *Southdun's* refusing to appoint a Day, they ought forthwith to have resorted to the Commissioners, who, it cannot be doubted, would most readily have named a peremptor Day for the Examination; and it is inconceivable that *David Sinclair* the younger would have neglected this, when he saw his Father just a-dying, if he had not judged it more for their Interest, that Matters should remain as they were.

And.

And therefore to conclude, as this is a very heavy Claim that is now brought against the Petitioners, founded upon a Bill of so old a Date, that the Interest is swelled to more than double the principal Sum, labouring at the same time under such suspicious Circumstances, as must give the strongest Conviction of its not being a true Debt; and, as the Facts referred to *David Sinclair's* Oath were unquestionably relevant to cut down the same, that he was rightly held as confessed for refusing to depone; and thereafter reponed against that Circumduction, under the express Condition, that, if he died before deponing, the Circumduction should stand; that he accordingly did die before deponing, merely by his own Fault or Neglect, to say no worse, after such a Train of Devices to protract the deponing, could no longer be available; and as the Petitioners are, by means thereof, deprived of several Witnesses, who could have proved many of the Facts contained in *Southdun's* Condescendence, they are, in your Lordships Judgment, whether this Pursuer has any Claim either in Law or Justice, to be reponed against that Circumduction.

May it therefore please your Lordships to alter the Lord Ordinary's Interlocutor, and to sustain the Defence, and assolzie.

According to Justice, &c.

ALEX. LOCKHART.

JANUARY 7, 1768.

ANSWERS

FOR

ALEXANDER SINCLAIR Portioner of *Brabsterdorren*, Pursuer,

TO THE

PETITION of DAVID THRIEPLAND, and others, Defenders.

JAMES SINCLAIR of *Lyth* was Grand-uncle to the present Pursuer, and formerly one of the Clerks to the Bills; and, by his Industry and Knowledge in Business, acquired a very considerable Estate, partly heritable, and partly moveable.

Mr. *Sinclair's* Relations lived in the County of *Caithness*, where he himself was born, and resided for the first Part of his Life.

In *July* 1721, Mr. *Sinclair* went to *Caithness*, partly, with a view of settling some Affairs in that County, in which he was himself interested, and partly, to see his Friends and Relations, from whom he had resided at a great Distance for a considerable Time; and as he had always lived on the best Terms with *David Sinclair*, Portioner of *Brabsterdorren*, his immediate younger Brother-german, and Grandfather to the present Respondent, while he remained in *Caithness*, he had his principal Residence at the House of his Brother, *David Sinclair*.

In the Beginning of the Year 1722, when *Lyth* was about to return to *Edinburgh*, and had finished his Business in *Caithness*, he was seized with an Indisposition, of which he died the 22d of *February*, leaving no Issue.

A

Lyth

Lyth was the second of three Brothers; *Patrick Sinclair* of *Southdun* was his immediate elder Brother, and *David Sinclair* Portioner of *Brabster-Jorren*, the Respondent's Grandfather, was his immediate younger Brother, and, consequently, his Heir of Line.

On Mr. *Sinclair's* Death in *February 1722*, *David Sinclair*, then of *Southdun* (his Father, *Patrick*, being dead, having, by his Agents, got Possession of *Lyth's* Papers, which were lying in his House at *Edinburgh*, obtained himself served Heir of Conquest to *Lyth*; and, partly, on that Title, and, partly, as pretending to be Executor-creditor, he did, in the Year 1725, raise a general Reduction of all Deeds whatever, executed by Mr. *Sinclair* of *Lyth* in favour of any of his other Relations.

The only Reason of Reduction offered by *Southdun* to the different Deeds called for by him in this Action of Reduction, from the different Persons in whose favours they were granted, was that of Death-bed; and, as it seems Mr. *Sinclair* of *Lyth* had died within sixty Days after the Date of these Deeds, they were, after a Proof led, reduced, on the Head of Death-bed.

Among other Writs called for by this general Action of Reduction, at *Southdun's* Instance, was a Bill for 6000 *l. Scots*, drawn by the Respondent's Grandfather, *David Sinclair*, upon, and accepted by, his Brother *Lyth*, 18th *October 1721*.

As this Bill was drawn and accepted several Months before *Lyth's* Death, it was impossible for *Southdun* to get the better of it on the Head of Death-bed, for which Reason he found it necessary to propound some other Reasons of Reduction as to the Bill; and for that Purpose, in *February 1729*, he gave in a Confession of Facts, as mentioned in the 4th Page of the Petition now to be answered, which he offered to prove by the Oath of *David Sinclair* elder. The Substance of the Confession is, That there was no Value paid for the Bill, that there were certain Alterations made in the Address of it, and that there was no Date affixed to it at the Time it was accepted.

David Sinclair of *Brabster-Jorren* would have been under no Difficulty to have deposed on this Confession, in such a Manner as would have been decisive of the Cause in his favour; but he was advised by his Council, that he could not be obliged to depone upon that, or any other Confession which *Southdun* could exhibit, as the Process at that Time stood. And, accordingly, it appears

from the Minutes of Debate in the Decreet of Reduction as to the other Deeds, and in a Reclaiming Petition given in, in name of *David Sinclair* younger, the Respondent's Father, and other Defenders, that they objected, That it was not competent for the then Pursuer, *Southdun*, as general Heir of Conquest, to insist in a Reduction of the Deeds granted by *Lyth*, without first having shown that there was an Estate, to which, as Heir of Conquest, he could succeed, which he had not at that Time done, as there was no Law which hindered any Person to dispose of his Moveables, even gratuitously, at any Time he pleased; and for these, and many other Reasons there urged, which the Respondent will not at present trouble your Lordships with repeating, the Council for *Brabsterdorren* declined taking a Day for him to depone, as was insisted on by the Council for *Southdun*; and, upon advising the Minutes of Debate, the Lord *Monzie* Ordinary, of this Date, pronounced the following Interlocutor: "Sustains the Pursuer's Title, and finds, that the Heir of Conquest had Right to quarrel any gratuitous Deeds granted on Death-bed, in so far as these Deeds might affect the Subject falling to the Heirs of Conquest, or to a Burden thereupon, or disappoint the Heir of Conquest of any Relief competent to him for disburdening the Subject of his Succession; and, seeing the Defender's Procurator declined, when required, to take a Day, or Commission, for the Defender to depone on the Reasons of Reduction above repeated, and the above Points and Qualifications referred to his Oath, held the Defender as confessed thereon, and reduced and decerned."

Decreet, p.
33, 34, 39,
40, 41, 42,
43.

Feb. 12th,
1729.

This State of the Fact, which appears from the Decreet, the Respondent hopes will satisfy your Lordships, that the Observation made in the Petition, that there was no Cause assigned for *David Sinclair's* refusing to take a Day to depone, is without Foundation; for your Lordships will observe, that he was expressly advised by his Council, that he could not be obliged to depone; and so certain did the Council think themselves in the Opinion that they had given him, that they would not allow him to acquiesce in the Lord Ordinary's Interlocutor, but applied by Reclaiming Petition to the whole Lords, complaining of the Lord Ordinary's Interlocutor above recited, holding *David Sinclair* as confessed, and also stating fundry other Arguments, as to Matters not now in dispute, to their Lordships Consideration.

Pet. p. 5.

The

The Lords, having advised the Petition, with Answers, of this Date, pronounced an Interlocutor, which, in so far as concerns the present Matter in dispute, is in these Words: " And find, that *David Sinclair, who is Creditor in said Bill*, ought to depone as to the Verity of the Date of the Bill, and as to the true Cause thereof, and the Time of his signing the same, and the other Articles of the Condescendence, particularly narrated, or otherwise hold him as confessed, and remitted to the Ordinary on the Bills, in Time of Vacance, to grant Commission, if desired."

The Petitioners pretend to be surpris'd that there could be any Doubt entertained as to the Identity of the Person whom the Court meant should depone upon *Southan's* Condescendence; but the Respondent apprehends your Lordships will not think it extraordinary that such a Doubt should arise, when you are informed, that the Bill in question was accepted by *Lyth*, in favour of *David Sinclair*, his Brother, as Drawer, (the present Respondent's Grandfather) but, prior to *Southan's* Action of Reduction, the Bill had been indorsed by *David Sinclair* elder, the Drawer, and given by him, in consequence of a Settlement betwixt them of their Family-affairs, to *David Sinclair* younger, his Son, Father to the present Respondent.

Your Lordships will observe, that the Interlocutor of the Lords, above recited, and which was pronounced in the Hurry of the last Days of a Session, appoints *David Sinclair, who is Creditor in said Bill*, to depone as to the Verity of the Date of the Bill, &c. and both Father and Son being of the same Name and Sirname, and the Father Drawer, and the Son Holder, of the Bill, in consequence of an Indoriation, it was at least a doubtful Matter, which of them was meant by the Interlocutor above mentioned, as the Character of Creditor would in a great Measure apply to either of them; the one as Drawer, the other as Indorsee; and what still tended to make it more doubtful was, that one of the Articles particularly referred to Oath, was, as to the Date of the Bill, which certainly must have best consisted with the Knowledge of *David Sinclair* younger, as *Southan* all along admitted and contended, that he was the Writer of the Bill. and that it appeared a doubtful Matter, even to the Judges themselves, is evident, because they ordered a short Petition, which was presented in Name of *David Sinclair* younger, praying an Explanation of the former Interlocutor, so as to ascertain, whether it was the Father or Son meant to depone, to be answered;

ed ; and upon advising the Petition and Answers, they remit to the Lord Ordinary, of this Date, “ to circumduce the Term against *David Sinclair* elder, with Power to prorogate the Commission formerly granted to the 20th *July*, and declared, that “ if the said *David Sinclair* elder should die before deponing, that “ the Circumduction should stand, and he be held as confessed.”

June 24th,
1729.

In consequence of the above Remit, the Cause being called before the Ordinary, his Lordship, of this Date, pronounced the following Interlocutor : “ Circumduces the Term against *David Sinclair* elder, for not deponing, and holds him as confessed, and “ decerns ; but in case he shall yet incline to depone, renews the “ Commission formerly granted to him to for “ taking his Oath, in terms of the Decreet, and that at “ the Day of *July* then next, to be reported the “ 20th Day of said Month of *July* ; and, in terms of the Lords “ Interlocutor in Presence, declares, that if the said *David Sinclair* “ should die before deponing, that the Circumduction should stand, “ and he be held as confessed.”

June 25th,
1729.

About this Period an Accident happened, which for some time put a Stop to the Process of Reduction. *David Sinclair* of *Southdun* having, ever since his Uncle *Lyth's* Death, had Possession of the Estate, both real and personal, which formerly belonged to him, was, by this Addition to a considerable Estate left him by his Father, become exceedingly opulent, and endeavoured, on every Occasion, to be a leading Man in that Part of the Country ; and having met with Opposition in some of his Schemes, from *David Sinclair*, younger of *Brabsterdorren*, the Respondent's Father, his Pride could not bear to be crossed, by a Man whose Fortune was so inconsiderable, compared to what *Southdun* was possessed of, by the Acquisition of his Uncle's Estate ; and his Passion carried him so far, that, without any just Provocation, he violently attacked the Respondent's Father, who, as your Lordships have been informed, was Creditor in the Bill under Reduction, in virtue of an Indorsation.

In consequence of this Battery committed by *Southdun* during the Dependence of the Action, *David Sinclair* was advised to apply to your Lordships, which he accordingly did ; and a Proof being allowed and reported, the Court, after hearing Council for fe-

14. veral Days, of this Date, absolved *Southam*, upon this Footing, that it was not fully proven he had been the Aggressor.

The Petitioners now endeavour to shew your Lordships, that this Application of *David Sinclair*, on account of the Battery, was a Device tried, in order to procure a Delay; but, from the Proof taken at that Time, it plainly appears that there were sufficient Grounds for the Application at that Time made by *David Sinclair*, although there was not, in the Judgment of the Court, full Proof for finding *Southam* guilty.

January 13,
1731. The Action of Reduction having been again called, of this Date, the Lord Ordinary prorogated the Term for *David Sinclair*'s deposing, and granted Commission, to be reported the 15th of February; but, upon a short Representation being preferred to the Ordinary, shewing the absolute Impossibility of reporting *David Sinclair*'s Oath at that Season of the Year, in so short a Time, from so remote a Corner of the Country, and so difficult of Access, by reason of many Ferries, and bad Roads, his Lordship was, of this Date, after considering the Representation and Answers, pleased to pronounce this Interlocutor: "Prorogates the
" Time for reporting *David Sinclair*'s Oath to the 1st of June
" next, providing the Act for his deposing be extracted before the
" 1st of April, otherways allows Circumduction to go out; and, in
" all Events, that the Quality remain as in the former Interlocu-
" tor, in case of the Death of the said *David Sinclair*, in the mean
" time."

February 24,
1731.

In terms of the above Interlocutor, an Act and Commission was immediately extracted and sent to the Country, in order for *David Sinclair*'s deposing upon the Condescendence formerly given in by *Southam*. As this Act and Commission was to be executed in *Guthrie*, because, at that Time, *David Sinclair* was an old infirm Man, it was necessary to name some Persons in that Country as Commissioners, and *Southam*, having the liberty of naming his own Commissioners, appointed *James Budge* of *Forthingall*, and *James Campbell* Sheriff-clerk of *Guthrie*, two of his own intimate Friends and Companions, to be his Commissioners for taking *David Sinclair*'s Oath; and it is pretty remarkable, that, in this Act and Commission, there was not, as there usually is, any Alternative to, or Power given, the Judge-ordinary, to act, in case the Commissioners should not attend.

David

David Sinclair having extracted the Commission, and got it sent to the Country, long before the Beginning of *April*, he repeatedly applied both to *Southdun* and to the Commissioners named by him, desiring that they would concert among themselves, and appoint any short Day they thought proper for taking his Oath. But, after having several times made such Applications, and finding that both *Southdun* and the Commissioners wanted to shift fixing any particular Time, and, if possible, by that Means, prevent *David Sinclair's* deponing, as he was, at that Time, an old infirm Man, and in a bad State of Health, they imagined, that, should he die before deponing, *Southdun* would be intitled to avail himself of the conditional Circumduction contained in the Interlocutor, holding *David Sinclair* as confessed.

David Sinclair, at last, plainly perceiving their Intention, had Recourse to what occurred to him to be the properest Way to oblige them to fix a peremptory Day for his deponing; and, with this View, he, of this Date, gave to *Benjamin Doull*, Notary-publick, a Mandate in the following Terms: "You'll go to *James Budge* of *Toftingall*, and *James Campbell* Sheriff-clerk, who are the Commissioners named by *Southdun*, my Nephew, for taking my Oath on the Condescendence given in by him, anent the Verity of the 6000 *l.* Bill accepted by my Brother, payable to me, and indorsed by me to my Son, which *Southdun* raised Reduction of; and require one or both of them to come here without Delay, and this is your Warrant. Signed with my Hand at *Wester*, the 15th Day of *April*, 1731, by me D^A. SINCLAIR."

April 15,
1731.

In consequence of the above Mandate or Order, *Doull*, the Notary-publick, went the next Day, being the 16th Day of *April*, to the two Commissioners, and intimated to them the Act and Commission, and required them, in proper Form, to appoint a short Day for taking *David Sinclair's* Oath, their Answer was, They were ready to do so when *Southdun* pleased.

Upon receiving this Answer from the Commissioners, the Notary went next Day, the 17th, to *Southdun's* House, where, in Presence of *David Sinclair*, younger, the Respondent's Father, and other Witnesses, who shall be afterwards mentioned, he required *Southdun*, under Form of Instrument, to appoint a Day for taking *David Sinclair*, elder's, Oath; but to this peremptory Demand he received trifling and shifting Answers, as appears not only from the Protest itself, a Copy of which is annexed to these Answers, but also from the Answers given by *Southdun*, to *David Sinclair's* Condescendence after mentioned.

From

From what has already been said, it must evidently appear to your Lordships, that it was *Southdun's* Intention, as it unquestionably was his Interest, that old *David Sinclair* should die without deponing, as, in that Event, he hoped to avail himself of the conditional Circumduction contained in the last Interlocutor; and, in pursuance of this Plan, both *Southdun*, and the Commissioners named by him, shifted appointing any Time for examining *David Sinclair*, which it was not in *David Sinclair's* Power to prevent, because the Commission, as has already been said, did not contain the usual Powers to the Judge-ordinary to act, if the Commissioners should not.

By this most unjustifiable Procedure in *Southdun*, he in a great measure obtained what he aimed at; for, in the Beginning of May 1731, *David Sinclair*, elder, the Respondent's Grandfather, died without having deponed on *Southdun's* Condescendence, owing, as has already been said, and shall, in the Sequel, be more fully shown, to the various affected Delays, purposely contrived by *Southdun*, and the Commissioners who were his Friends and Intimates, and acted entirely under his Influence and Direction.

After the Death of *David Sinclair* elder, *Southdun* allowed his Action of Reduction to lie over several Years; but, in 1736, having again awakened and insisted in the same, a State was prepared, and, of this Date, the Lords found Death-bed proven, and reduced, except as to the Bill of 6000 *l.* in the Person of the Respondent's Father.

After the Date of this Interlocutor, in 1736, reducing the other Deeds called for by *Southdun*, except the Bill now in question, *Southdun's* Deer thought proper to extract the conditional Circumduction, holding *David Sinclair*, elder, as confessed, by reason of his not deponing, which was pronounced in the 1720, and again renewed in the subsequent Interlocutor in 1731, allowing him to depone betwixt and the first of June then next. This conditional Circumduction was extracted by *Southdun*, without *David Sinclair*, the Respondent's Father, or his Deer's, knowing any thing of *Southdun's* Intention so to do.

In this Situation the Respondent's Father was under a necessity of applying to the Court to be reponed against this conditional Circumduction, so improperly stolen out by *Southdun*, at the Distance of seven Years from the Date of the Interlocutor, and without the least Notice being given to the other Party. But, at the same time,

left

lest the Court should be under any Difficulty, in point of Form, as to granting the Desire of this Application, the Respondent's Father did raise, and bring into Court, a Reduction of this pretended irregular Decreet of Circumduction. And, upon advising the above mentioned Petition, with Answers for *Southdun*, the Lords, of this Date, pronounced an Interlocutor, " Adhering to the former Interlocutor, finding Death-bed proven as to all Writs craved to " be reduced, except the 6000 l. Bill, and remitted to the " Lord *Monzie*, Ordinary in the Cause, to hear Parties Procurators " as to the Regularity of the Extract of the Circumduction, with " Power to determine, or report."

Dec. 11th
1736.

In consequence of this Remit, the Cause having been called before the Lord Ordinary, *Southdun's* Council took Advantage of the Absence of the Respondent's Council, and obtained an Interlocutor, finding the Decreet of Circumduction complained of was regularly extracted, dismissing the Complaint, so far as it complained of said Extract, and assailing from the Reduction.

Against this Decreet in Absence, the Respondent's Father gave in a Representation, which the Lord Ordinary appointed to be seen and answered, and in this Shape did the Process lie over till the 1750.

The Petitioners now lay great Stress upon the Delay that has been in this Action, and would from that insinuate to your Lordships, that the Respondent's Father must have had very little Hopes of Success; but this was not the Case, for the Respondent's Father, after the Year 1731, the Time of his Grandfather's Death, was amused by *Southdun* and his Friends, with the Hopes of getting this Matter amicably settled by a Submission; and, accordingly, your Lordships see, that, from *February* 1731, that the Commission was allowed for old *David Sinclair's* deponing; not one Step was taken by *Southdun* in his Reduction, till the 1736, that he clandestinely extracted the conditional Circumduction, which had been pronounced in the 1729; and immediately, on that Circumduction's being extracted, your Lordships see Application made by the Respondent's Father to be reponed against it; and the Respondent cannot help observing, that *Southdun's* Conduct cannot be much commended in thus endeavouring to take an undue Advantage of the Respondent's Father; by clandestinely extracting the Circumduction, when, at the same time, he was amusing him with the Hopes of a Submission.

The same Reason, that prevented the Cause from going on from the 1731 to the 1738, likewise prevented its going on from the 1738 to the 1750. *Southam*, by his own Estate, and the late Acquisition of *Litch's*, was in very opulent Circumstances; and, as the Respondent's Father had Reason to believe, for several Years after the 1738, that he should get this Matter settled in an amicable Manner, which, as his Circumstances were but moderate, he would rather have listened to, than have been engaged in an expensive Law-suit with so opulent an Opponent: He did not, immediately after the 1738, incline rigorously to insist, as he was by his Friends in the Country still amused with the Hopes of a Submission; and your Lordships farther know, that, soon after the 1740, that Part of the Country was for some Years in such Confusion, that little private Business was thought of there.

The Respondent's Father being at last wearied out with the various Shifts and Pretences of *Southam* and his Friends, and despairing of getting Matters settled in an amicable Way, resolved to insist in, and bring to a Conclusion, the Action depending before your Lordships.

Southam, being well informed of the Intention of the Respondent's Father, and conscious, that it was, through his own Fault, that the Action had been delayed so long, he therefore, if possible, to throw the Appearance of Backwardness upon the Respondent, resolved to have the first Word, and, in that view, he execute a Summons of Wakening in April 1750; but, before doing so, he well knew, that the Respondent's Father had given Orders for executing one against him.

In consequence of this Wakening, and a Remit from the Court, the Cause came before Lord *Westball*, as Ordinary, and Parties, of this Date, appearing by their Council, *Southam's* Procurator contended, that the Decree of Circumduction ought to be found regularly extracted, as *David Sinclair*, elder, had died before deposing.

The Council for the Respondent's Father answered, that it was evident, *David Sinclair* intended to depone, because, in terms of the Lords Interlocutors, he had extracted an Act for that Purpose, and that it was entirely owing to *Southam's* Conduct, that he had not deposed, as neither he nor his Commissioners would appoint Day for that Purpose, though often desired, and even required under Form of Instrument (as appears from the Protest annexed)

which

which Facts being controverted upon the Part of *Southdun*, the Council for the Respondent's Father offered to undertake a Proof of them; but, before doing so, contended, that *Southdun* ought to be ordained to confess or deny, by a Writing under his Hand, certain Facts, of which at that Time the following Condescendence was given in, 1mo, Where did *Southdun* reside upon the 17th of April 1731?

2do, What Distance is there betwixt the Place where *Southdun* then resided, and the Place of Residence of *David Sinclair* of *Brabsterdorren*, elder?

3tio, Did you then know, or was you informed, that the said *David Sinclair*, elder, was at that Time indisposed? By what Means, or from whom had you that Information?

4to, Does it consist with your Knowledge, when *David Sinclair*, elder, died?

5to, Did you see *Benjamin Doull*, Notary-publick, and *David Sinclair*, younger, upon the 17th April 1731?

6to, Was there an Instrument of Requisition and Protest taken against you, that Day, in the Hands of the said *Benjamin Doull*, Notary-publick? At what Place, and at what Time of the Day, was that Instrument taken against you?

7mo Was the Act and Commission, which the Lords of Session had granted to *James Budge* of *Tostingall*, and *James Campbell*, Sheriff-clerk of *Caithness*, for taking the Oath of *David Sinclair*, elder, upon the Points referred by you to his Oath, then presented and intimated to you?

8vo, Was it then notified to you, that the aforesaid Act and Commission had the Day preceeding, or some other Day, then recently past, been presented to the aforesaid Commissioners, in order to their appointing a Day, to take the Oath of the said *David Sinclair*, elder? And was not you also then told, that the said Commissioners had agreed to attend any Day that you would name for the above mentioned Purpose?

9no, Was not you thereupon required to appoint a Day, for taking *David Sinclair*, elder, his Oath?

10mo, Was it not, at the same time, notified to you, that the said *David Sinclair*, elder, was then in such a bad State of Health, that his Life was thought to be in hazard? And, was not you therefore required to appoint the Day for taking his Oath, without Delay or

Loss

Loss of Time, by reason, and upon account, of his Indisposition and bad State of Health?

11mo, Did not you thereupon answer, that you could not then condescend upon any particular Day for that Purpose, but that you, and the Commissioners, would name a particular Day in the Month of *May*, when you and they would attend, and that you would give timely Notice thereof to *David Sinclair*, elder and younger? If you deny, that this was your Answer, as at first made, or Words to that Purpose, you are desired specially to set forth, what other Answer you did make, and the precise Words of such Answer, so far as you can recollect?

12mo, Did not *David Sinclair* younger, thereupon represent to you, that *David Sinclair* elder was in such a bad State of Health, that it was believed he would not live long? Did he not therefore require you, to appoint *Monday* or *Tuesday* then next, for taking *David Sinclair* elder his Oath?

13to, Did not you thereupon repeat your former Answer, or Words to that Purpose, importing, that you could not then fix any particular Day, but would attend with the Commissioners, for the above Purpose, upon some lawful Day in the Month of *May*, of which you would give previous Notice to the said *David Sinclair* elder and younger?

14to, Did not *David Sinclair* younger thereupon reply, that your postponing the Examination must be with a view that *David Sinclair* elder, might, in the mean time, die, before deposing, or Words to that Purpose? And, did not he thereupon protest, or insist, that as *David Sinclair* elder, was ready and willing to depone upon the several Points in the Act and Commission, and that the Commissioners named in the Act were also willing to attend; and as you then refused or postponed to appoint any Day for that Purpose, that, therefore, in case the said *David Sinclair* elder should happen to die before deposing, he should not be held as confessed upon the Points in the Act mentioned, or in your Condescendence, as ingrossed in the Act?

15to, And, in case you deny the several Requisitions, Answers, and Replies above mentioned, you are desired specially to set forth, what other Requisitions, Answers and Replies, were made upon that Occasion, stating the very Words, as far as you can recollect.

16to, Did you, at any Time thereafter, before *David Sinclair* elder's Death, notify to the said *David Sinclair* elder and younger, any particular Day, when you would attend for the above mentioned Purpose? or did you appoint any such Day with the Commissioners named in the Act?

To the above Condescendence, on the Part of the Respondent's Father, Answers were given in on the Part of *Southdun*, signed by one of his Council, although the Lord Ordinary's Interlocutor expressly ordered the Condescendence to be answered, by a Writing under *Southdun's own Hand*.

Your Lordships will observe, that every Fact and Circumstance set forth in the Condescendence for the Respondent, was such, that they must necessarily have consisted so far with *Southdun's* proper Knowledge, as to enable him to have given clear and explicate Answers, either admitting or refusing the Facts there stated. Yet, from the Answers given in, your Lordships will see how artfully he evades giving explicate Answers to many Facts, which it certainly was in his Power to have given peremptory Answers to.

The Answer to the first Article of the Condescendence is as follows: That *Southdun* resided, in April 1731, at his own House at *Brabsterdorren*, where he now lives.

To the second, That *David Sinclair* elder, some Time in *Brabsterdorren*, did, in the Month of April 1731, reside in *Wester Watin*, at the Distance of three Miles, or thereabout, from *Brabsterdorren*.

To the third, That *Southdun* did not know, or hear from any Person, that *David Sinclair* elder, then residing in *Wester Watin*, was in the Month of April 1731, indisposed, and that he never had any Information of it at that Time; from any Person, to the best of his Memory.

To the fourth, That being obliged, in the End of April 1731, to travel from his own House to *Inverness*, which is about sixty-five Miles, or thereby, and four Ferries, to attend the Circuit-court, on the first of May, as an Assizer; as he returned homeward from that Court, he was, on his Way, informed, that *David Sinclair* elder, had died about the Beginning of that Month. and that this was the first Information he had either of his Sickness or Death, to the best of his Remembrance.

To the fifth, he remembers, that on some Day in *April* 1731, but upon what Day he cannot condescend, he saw *Benjamin Doull* and *David Sinclair* younger.

To the sixth, he remembers, That he met with him upon the Green before his own House ; but neither remembers the Day, nor the Time of the Day, nor does he remember that there was any Instrument taken against him that Day at that Place.

To the seventh, he does remember, That they discoursed about the Act and Commission mentioned in the Condescendence, but does not remember that the Act and Commission was then presented or intimated to him.

To the eighth, he does not remember that it was then notified to him, that the Act and Commission had been presented to the Commissioners, in order to their appointing a Day for taking the Oath of *David Sinclair* elder, nor that it was told him that the Commissioners had agreed to attend any Day that he would name.

To the ninth, he does not remember that he was required to appoint a Day for taking said *David Sinclair's* Oath.

To the tenth, That it was not notified to him at that Time, that *David Sinclair* was then in such a bad State of Health that his Life was thought to be in Hazard ; nor does he believe that he was therefore required to appoint a Day for taking his Oath without Delay or Loss of Time, by reason and upon account of his Indisposition and bad State of Health ; because he had not then any Account of his Indisposition from any Person.

To the eleventh, That, at this Distance of Time, he cannot remember what passed betwixt him and the said *David Sinclair* and *Benjamin Doull* concerning that Affair ; but he believes it might have been to this Purpose, that he would advise with the Commissioners, and appoint such a Time as would be convenient for them to attend ; and he would intimate the Time the Commissioners would appoint to said *David Sinclair* younger.

To the twelfth, he does not believe that *David Sinclair* younger represented to him, that *David Sinclair* elder was in such a bad State of Health, that it was believed that he could not live long, nor that he required him to appoint *Monday* or *Tuesday* then next, for taking his Oath.

To the thirteenth, he believes that he made no other Answer but that he would concert with the Commissioners a proper Time
for

for taking *David Sinclair* elder's Oath, which he would intimate to *David Sinclair* younger.

To the fourteenth, he does not remember that *David Sinclair* younger made any Complaint upon his Answer, and he is positive that he did not inform him that *David Sinclair* elder was in a bad State of Health.

To the fifteenth, *Southdun* believes, that what he has above answered will set forth all that passed upon that Occasion betwixt *David Sinclair* younger and him, in Presence of *Benjamin Doull*, as far as he can recollect after so long a Time.

To the sixteenth, He could not notify to *David Sinclair* younger, any Appointment before *David Sinclair* elder's Death, as he was obliged to be at *Inverness* so soon after their first Meeting; and that *David Sinclair* elder died before his Return; and as he could not conveniently meet with the Commissioners to appoint a Meeting to take the Examination before he went for *Inverness*.

Upon the whole, *Southdun* believes, that as *David Sinclair* younger knew that *David Sinclair* elder, could not emit any Deposition in his favours, if he did certainly know that *David Sinclair* elder was in such a bad State of Health at the Time, that he might die before *Southdun*'s Return from *Inverness*, where he knew he was bound to attend, he would have concealed the State of *David Sinclair* elder's Health, from *Southdun*, that he might not be examined before he died, as it appeared, by every Step in this Process, he was unwilling to have him examined, and *Southdun* believes that this Instrument was made up after *David Sinclair* elder's Death, to favour this new Device; and though the Notary was prevailed upon to subscribe this Instrument, yet, if he had been alive, he would not have deposed upon it, and, for that Reason, the Process has been delayed till after the Notary's Death, as it is well enough known by whose Influence he might have subscribed it.

Such are the Answers given in by *Southdun*; and your Lordships will observe, he acknowledges that *David Sinclair* younger, and the Notary-publick, *Doull*, came to him in April 1731: That he remembers they discoursed about the Act and Commission mentioned in the Condescendence, but does not remember that it was notified to him, or that he was required to appoint a Day for taking *David Sinclair* elder's Oath, yet, in his Answers to the 11th and 13th Articles, he expressly says, that his Answer was, that he would

would concert with the Commissioners, and appoint a proper Time with them for taking *David Sinclair* elder's Oath, which he would intimate to *David Sinclair* younger; which Answer plainly shows, that he had been asked to fix on a particular Time. But the Answers, from Beginning to End, are in such a Strain, that the Respondent cannot consider them as intended to give full Light into the Matter set forth in the Condescendence, as they are in many Places equivocal and general, as to Facts and Circumstances that must have consulted with *Southdun's* Knowledge.

As Parties differed so widely in Point of Fact, the Lord *Woodhall*, Ordinary, of this Date, allowed both Parties a Proof of their different Allegations, and granted Commission for that Purpose. In consequence of which Interlocutor, a Proof was taken and reported to the late Lord *Edgfield*, who, of this Date, made great Avifandum with it.

Soon after this Period, *David Sinclair* younger, the present Respondent's Father, died, and *Southdun's* Relations again proposed a Submission to the Respondent. But *Southdun* himself likewise dying about this Time, and some of his Representatives, the present Petitioners, being Minors, their Relations did not care to take Burden for them in a Submission, which again obliged the present Respondent to insist in this Action before your Lordships, which being awakened and transferred against the Heirs and Representatives of *Southdun*, the Respondent applied to your Lordships for a Remit to a new Ordinary, in place of Lord *Edgfield*, with Power to his Lordship to advise the Proof brought, which did not consist of above six Pages, and is annexed to the Petition.

In consequence of which Application, the Cause was, of this Date, remitted in course to Lord *Barjarg*; and his Lordship having called the Cause, of this Date, the Petitioners Council did not incline to appear to debate; upon which his Lordship made Avifandum to himself with the Proof adduced, and of this Date was pleased to pronounce the following Interlocutor: " Having considered the Proof adduced, and Remit by the Lords, finds it proved, that the Act and Commission was duly intimated to *Southdun*, and also to the Commissioners therein named, and Requisition made to them to have the Oath of *David Sinclair* taken before the Commissioners within some short Time, which was refused by *Southdun*, and that *David Sinclair* died of the In-
" disposition

“ disposition he then laboured under, before the 1st of *June*, and
 “ that his Oath was thereby lost by the Fault of *Southdun*; that
 “ the Decreet of Circumduction was therefore improperly and
 “ wrongously extracted by him, and therefore finds the same is
 “ reducible, and reduces, decerns, and declares, in terms of the
 “ Libel.”

Against this Interlocutor, the Petitioners presented two Representations, one of which his Lordship refused without, and the other with Answers, and, of this Date, adhered to the Interlocutor above recited.

Decemb. 10
1767.

The Petitioners have now submitted these Interlocutors to your Lordships Review; and the Petition being appointed to be answered, this is humbly offered on the Part of the Respondent.

As the Respondent has taken the liberty to state so fully to your Lordships the whole Procedure had in this Action, and as the whole Matter now before your Lordships entirely depends upon the Import of a very short Proof, a Copy of which is annexed to the Petition, he will not presume to trouble your Lordships with much in the Way of Argument.

As to what is said in the Petition respecting the Relevancy of the Proof, the Respondent, with Submission, cannot have a Doubt, that if he is able to satisfy your Lordships, that, in consequence of the Interlocutor in the 1731, upon which the Act and Commission was extracted, *David Sinclair* elder was willing to depone, nay, farther, that he took every Method that he possibly could, in order to oblige *Southdun* and the Commissioners to take his Oath, and that it was entirely owing to their Neglect, and their shifting and refusing to appoint any Time for examining Mr. *Sinclair*, that the Proof by his Oath was lost: That, in that Event, your Lordships will be of opinion, that the Circumduction was improperly extracted in the 1736, and that the same ought therefore to be reduced.

The Petitioners endeavour to show your Lordships, that, previous to the 1731, the Respondent's Father contrived various Methods to prevent *David Sinclair* elder's being examined. But, upon what is already said, the Respondent does submit it to your Lordships, if, previous to the Time of old *David Sinclair*'s Death, in the 1731, there is one Delay that did not, in effect, proceed from *Southdun* himself.

And your Lordships will observe, that, after the 1729, when the Interlocutor was pronounced, appointing *David Sinclair* elder, either to depone upon *Southdun's* Condescendence, or holding him as confessed, in case of his dying without deponing, *Southdun* and the Respondent were by no means upon equal Terms, because, could *Southdun*, by any means, have prevented *David Sinclair* elder from deponing, without appearing to have had any hand in that Delay himself, he would have had an excellent Plea for holding him as confessed, in terms of the Interlocutor, in which, had he been successful, it would have been decisive of the Cause in *Southdun's* Favour.

On the other hand, it was clearly the Respondent's Interest, that *David Sinclair* should depone, to prevent the Circumduction's taking place, and accordingly your Lordships see him taking every Step possible to bring that Matter to an Issue.

Immediately after the Interlocutor 1731 was pronounced, the Respondent's Grandfather, at a large Expence, extracted an Act and Commission, from which it is evident, that he seriously intended to depone upon the Facts referred to his Oath. And when, by repeated Applications, he could not bring *Southdun*, nor the Commissioners, to fix any Time, he writes a formal Mandate to a Notary-publick, requiring him to go and desire *Southdun* and the Commissioners to come and examine him. In consequence of which, the Notary goes, and, under Form of Instrument, expressly requires, first the Commissioner, and then *Southdun*, to come and take his Oath, which they declined to do. What, in that Situation, could *David Sinclair* do? Your Lordships have been informed, that the Commission contained no Alternative for the Judge-ordinary, to act, as is usual; so that, every Circumstance considered, the Respondent submits it to your Lordships, if *David Sinclair* did not take every Method he possibly could, to force *Southdun* to cause execute the Act and Commission, and that it was entirely the Fault of *Southdun* himself, that *David Sinclair* elder was not examined.

In a Note subjoined to the End of the Petition, it is observed, that *David Sinclair's* Mandate was directed to no Person. In the first place, there was no occasion for a Direction, as it was delivered by Mr. *Sinclair* himself into the Notary's Hand. But, farther, it is evident from the Oath of *Patrick Dnull*, the Notary's Brother, that this Mandate was delivered to *Dnull*, and that, in consequence of it, he took the Protest in Process; for he expressly depones,

depones, " That he found among the Papers of the deceased *Benjamin Doull*, the Deponent's Brother, which are now in his " Keeping, a Paper marked on the Back, " Scroll Instrument, *David Sinclair* against *Southdun*," with old *David's* Mandate, 17th " April 1731;" and inclosed within this Paper was another Paper, " subscribed, *Da. Sinclair*, dated ' the 15th of April 1731 Years, " which the Deponent believes to be the Paper which is called the " Mandate, both which Papers he produces before the Commis- " sioners, and they are both signed on the Back by himself, the " Commissioners and Clerk."

This Paper, marked as above described, is the original Mandate, given by old *David Sinclair* to *Doull*, the Notary, and is now in Process; and this clearly shows, that it was in consequence of the Mandate, that *Doull*, the Notary, took the Protest against *Southdun* and the Commissioners, and that it was taken at the Time contended for by the Respondent, as your Lordships will observe, that the Scroll found among *Doull's* Papers bears Date the 17th April 1731. This exactly agrees with what the Respondent has all along averred, and what he humbly hopes will evidently appear to your Lordships to be true, from the Proof adduced. But it exceedingly ill agrees with *Southdun's* Allegation, that this Story of the Protest was all a Piece of Cookery, betwixt *David Sinclair* younger, and the Notary, for, had that been the Case, the Notary surely never would have been allowed to keep Possession of the original Mandate, from the 1731 down to the 1753, when it was found among his Papers by his Brother, after his Decease, and by him produced to the Commissioners.

As to what is further said in the Note at the End of the Petition, that the Mandate is wrote with different Ink from the Subscription, the Respondent, from Inspection, cannot discover it, altho' he does not think it could be of great Consequence to either Party, was it as the Petitioners alledge.

The Respondent shall now very shortly state to your Lordships that Part of the Proof which he apprehends puts it beyond a Doubt, that it was entirely owing to the Fault of *Southdun* and his Commissioners, that *David Sinclair*, elder, was not examined before he died. And,

In the first place, he begs leave to submit to your Lordships Consideration, the Protest taken by *Doull* the Notary, in consequence of the Mandate above mentioned, an exact Copy of which Protest

is

is annexed to these Answers ; from which your Lordships will see, that the Facts, as there stated, precisely correspond with what has been all along advanced upon the Part of the Respondent, and clearly corroborated by the Proof.

Petitioner, p. 9. The Petitioners have said, that this Instrument cannot be admitted as sufficient Evidence, and that it would appear to be false in all the material Circumstances from the Proof adduced ; but the Respondents cannot discover one single Circumstance of the smallest Consequence that is mentioned in this Protest, that is in any Degree contradicted by the Proof now adduced ; but, on the contrary, that the Protest is clearly supported by the Proof, in every Circumstance of the smallest Consequence, and even in great Measure corroborated by what *Southdun* himself admits in his Answers to the Condescendence given in for *David Sinclair*, the Respondent's Father.

Answers to
S. 6. 7. 11.
and 12. Ar-
rivals of the
Condescen-
dence.
Your Lordships will observe, that *Southdun*, in the Answers he gave to the Respondent's Condescendence, acknowledges, that *David Sinclair*, younger, was at his House in April 1731, along with *Deull* the Notary, and that he remembers they discoursed about the Act and Commission, and that he, *Southdun*, gave them for Answer, that he would concert with the Commissioners a proper Time for taking *David Sinclair*, elder's, Oath, and notify the same to *David Sinclair*, younger.

In the Respondent's Apprehension, nothing can be a stronger Corroboration of the Verity of the Protest than these very Admissions of *Southdun*'s. For *David Sinclair*, younger, the Respondent's Father and *Southdun*, were not at that Time in so great Friendship as to visit one another ; and indeed the Respondent cannot figure for what Purpose *Deull*, the Notary-publick, would have been brought there, unless it had been to take the Protest now produced, and yet that he was at *Southdun*'s House in April 1731, along with *David Sinclair* younger, and that they discoursed together with *Southdun* about the Act and Commission, is admitted by *Southdun* himself.

But what puts the Authenticity of the Protest beyond all Doubt, is the Proof : *James Eadie* of *Tottinwall*, one of the Commissioners named in the Act by *Southdun*, deposes, " That, upon a cer-
" tain Day, but in what Month, or in what Year, the Deponent
" does not remember, the Pursuer, (i. e. the Respondent's Father)
" and *Benjamin Deull*, Notary-publick, came to his House at
" *Guthrie*, and intimated to him an Act and Commission for taking the
" Pursuer's

" *Pursuer's Father's Oath*, as far as he can remember. Depones, that he does not remember that *Benjamin Doull*, the Notary, required a short Day for examining the Pursuer's Father, because he was sick, but remembers that he agreed to accept of the Commission; and depones, that, at that Time, he heard that the Pursuer's Father had broke his Arm, but did not hear of any other Ailment about him. Depones, that he does not remember that he told the Notary that he was ready to examine him when *Southdun*, the Defender, called him, but knows that he was willing to accept, and examine the Commission in terms of the Act; and depones, that the Pursuer and the Notary told the Deponent, that they had come from Mr. Campbell's, and thinks they told him that they had intimated the Commission to Mr. Campbell."

It is true that Mr. Campbell's Oath resolves into a mere *non me mini*, for he expressly says, that he remembers nothing at all about the Act and Commission, although your Lordships see, that Mr. Budge expressly swears, that the Notary told him he had come from Mr. Campbell's to his House.

John Sutherland, one of the instrumentary Witnesses, who was, at the Time of taking the Instrument, Ground-officer to *Southdun*, and has resided ever since upon his Estate, and cannot therefore be suspected of any improper Bias in favour of the Respondent, depones, " That, having seen an Instrument taken in the Hands of *Benjamin Doull*, Notary-publick, to which he is a subscribing Witness, which Instrument is marked on the Back by the Commissioner, Deponent, and Clerk, and having heard the Instrument read, depones he subscribed that Instrument." He indeed afterwards says, that he did not hear what passed at the Time of taking this Instrument, being at a little Distance. And, upon his after Examination, he depones, " That he saw the Respondent's Father, *Southdun*, and the Notary-publick about a Place called the *Old Garden*, below *Southdun's* House." This exactly agrees with the Instrument of Protest itself, which expressly bears, That it was taken on a *Ley-field*, a little below *Southdun's* House."

Thomas Bremner depones, " That, about twenty-two Years ago, the Deponent was sent by *Benjamin Doull*, Notary-publick, then his Master, to the Pursuer's House, for him to meet him upon the *Ley-field* below *Southdun's* House in *Brabster*; and depones,

“ that he saw *Southdun* and his Master walk down to that Ley-
 “ field, and saw the Pursuer meet them there; and depones, that
 “ he saw the Pursuer have a Paper in his Hand, about the Bigness
 “ of the present Act and Commission, now shown to him; and
 “ depones, that, to the best of his Remembrance, he thinks it
 “ was about taking the Pursuer's Father's Oath, who was lying
 “ at that Time bad upon his Death-bed; and depones, that he
 “ saw the Pursuer take Instruments in his Master's Hands, and re-
 “ quire *John Sutherland*, who was then *Southdun's* Officer, and an-
 “ other *Sutherland* whom he does not know, and another Man
 “ whom he does not know, Witnesses at the taking of the Instru-
 “ strument; that he was required as a Witness himself, but could
 “ not subscribe the Instrument, as he could not write; and de-
 “ pones, that, in that Year, he went with the Pursuer and his
 “ Master to the House of Mr. *Campbell* in *Thurso*, and of *Testin-*
 “ *gall's* at *Gerth*, and he saw that Paper which his Master presented
 “ to *Southdun* in his Master's Hands, and he believes that their Bu-
 “ siness was to intimate that Paper to Mr. *Campbell* and *Testin-*
 “ *gall*; but as he had not Access to go up Stairs in the Gentlemens
 “ Houses, he did not see that Paper intimated to them, but he heard
 “ it was intimated to them.”

This Witness expressly says, that he heard his Master, the Notary,
 require the former Witness, *Sutherland*, to be an instrumentary
 Witness; *Sutherland* himself expressly swears, that he actually did
 sign the Instrument now in Process, but says he was not required
 to do so. Which of these Witnesses deserve most Credit as to this
 Circumstance, the Respondent will leave with your Lordships,
 with this single Observation, that *Bremner* is perfectly unconnected
 with either Party, and that *Sutherland* has been a kind of menial
 Servant to *Southdun* since the Year 1719.

The Petitioners have said, that *Bremner*, in his Oath, makes the
 Notary first go to *Southdun*, and afterwards to the Commissioners,
 although the Protest appears to be taken against the Commissioners
 on the 16th, and against *Southdun* on the 17th. The Respon-
 dent must acknowledge, that, after considering *Bremner's* Deposi-
 tion, he cannot find a single Circumstance in it which can entitle
 the Petitioners to put the Construction on it they do; for, in no Part
 of that Oath is it said, that the Notary went to *Southdun* prior to
 his going to the Commissioners; but as the Deposition itself is in-
 ferted

serted entire, the Respondent will leave it with your Lordships.

The Proof now under your Lordships Consideration was taken in the 1753; *Bremner* depones, That the several Facts mentioned in his Deposition happened about twenty-two Years before the Time of his emitting the same, which brings it exactly down to the 1731, the Time that the Protest was actually taken; and in this he is corroborate by Mr. *Budge* of *Toftingall*, who expressly depones, That *Doull*, the Notary-publick, came to his House at *Gerth*, and intimated an Act and Commission for taking old *David Sinclair's* Oath; but cannot particularly condescend upon the Period that this happened, although it must unquestionably have been in *April* 1731, because there was no Act and Commission extracted for *David Sinclair's* deposing till *March* 1731, and *David Sinclair* died the first Week of *May* immediately thereafter; so that it could be at no other Period that this Act and Commission was intimated to *Toftingall*, but in *April* 1731, when the Protest was taken.

All the Witnesses adduced expressly depone, that *David Sinclair* elder had in *March* 1731 got a severe Hurt in his Arm, which confined him in the House from that Period till his Death; and yet, in the Answers given in by *Southdun* to the Condescendence, he has expressly said, That he never heard of his being bad, although he only lived at the Distance of three Miles from him. This appears not a little extraordinary, as, in that Part of the Country, People of three Miles Distance look upon themselves as next Door-neighbours.

There is one Circumstance acknowledged by *Southdun* himself, which, in the Respondent's humble Apprehension, must clearly shew, that *Southdun* was not so anxious to have old *David Sinclair's* Oath taken, as he now endeavours to persuade your Lordships he was.

Your Lordships have seen all along that *Southdun* himself considered *David Sinclair* elder to be in a valetudinary State of Health; from the very Commencement of his Process in 1725, you see him admit, in his Answers to *David Sinclair's* Condescendence, that, in *April* 1731, he conversed with *David Sinclair* younger and the Notary-publick, about appointing a Time for examining old Mr. *Sinclair*, which however he thought proper to shift and put off, when at same time he tells your Lordships, that, in a few

Days thereafter, he was to undertake a long and tedious Journey to *Inverness*, cross several Ferries, &c. from which Place the Time of his Return was uncertain. Now, is it possible for your Lordships to believe, that, had *Southdun* been anxious to have *David Sinclair* examined, he would have undertaken such a Journey, before he had taken his Oath, in terms of the Act and Commission. This could have been attended with no Inconveniency to him, had he really intended that he ever should be examined, for he resided within three Miles of *David Sinclair's* House, the Commissioners were at hand, and it could not have taken up the Space of an Hour, to finish all the Business that was wanted.

This Conduct of *Southdun's* does by no means agree with what is pleaded on the part of the Petitioners, but it corresponds exactly with what is insisted on upon the part of the Respondent, viz. That *Southdun* wished for nothing so much as that *David Sinclair* should die without being examined; and accordingly your Lordships see the old Man dies in the Beginning of May, before *Southdun's* Return from *Inverness*.

Decree of
Reduction,
p. 29.

The Petitioners have said, that *David Sinclair* took the Advantage of *Southdun's* Absence, to elicit the several Deeds from *Lyth* that were called for in the Reduction; but this is a Misrepresentation in Point of Fact, for *Southdun* was in *Cuthbush's* with his Uncle *Lyth* at the Time of his Death, which was expressly acknowledged and insisted upon by *Southdun* himself, in his Action of Reduction, as appears from the Decree.

Petition, p. 3.

It is further said in the present Petition, that no Account ever was given, by what Means *David Sinclair* should have been possessed of so large a Sum as that contained in the Bill, or what occasion *Lyth* could have to borrow the same.

Although the Respondent does not look upon himself as obliged to account for that Matter, yet, had the Petitioners looked into the Respondent's Answers to their last Representation, they would have found that Matter naturally accounted for in this Manner:

In Autumn 1721, when *Lyth* came to *Cuthbush's*, he found that his Brother, *David Sinclair* elder, the Drawer of the Bill in dispute, and Grandfather to the Respondent, had a Claim for a Sum larger than that contained in the present Bill, against one *George Sinclair*, then living in *Lyth's*, who was a Friend and Intimate of *Lyth's*. *Lyth* wanted to relieve his Friend

George

George Sinclair of the Debt, and at same time indemnify his Brother, *David Sinclair*, for his Claim upon *George*; and, in order to do so, he gave *David* the Bill now in question, who thereupon delivered up the Vouchers of his Claim against *George* into *Lyth's* Hands, who afterwards gave them up to *George Sinclair* himself; but, on doing so, he made *George* come under a Back-bond to him, which Back-bond the Respondent believes to be in the Hands of some of the Petitioners at this Day.

As to the Delay of this Action, the Respondent has already shown your Lordships, that it was principally owing to *Southdun* and his Friends always amusing the Respondent's Father with settling Matters in an amicable Way, and that Delay has been a greater Loss to the Respondent than to the Petitioners, as, by that Means, he has lost the Evidence of the Notary who took the Instrument, and one of the instrumentary Witnesses, which would, in great measure, cut down every Argument used by the Petitioners on this Occasion.

Upon the whole, the Respondent hopes, that, after your Lordships have considered the Instrument of Protest hereto annexed, the Proof led in support of the Facts stated in that Instrument, and whole Circumstances of the Case, there will not a Doubt remain, that *Southdun* and the Commissioners were expressly required to take *David Sinclair*, elder's, Oath, and that the not doing so was entirely owing to *Southdun*; and when your Lordships see how willing the old Man was to depone, whose Character even by *Southdun* is admitted to be unexceptionable, you can as little doubt, that his Oath would have been decisive in the Respondent's favours; and as *Southdun*, exclusive of his Family-estate, fell into the considerable Fortune belonging to *Lyth*, and, as neither the Respondent, his Father or Grandfather, ever had a Farthing Value from *Lyth's* Effects, although your Lordships see *Lyth* living in the greatest Intimacy with his Brother *David Sinclair*; the Respondent therefore humbly hopes your Lordships will have no Difficulty in adhering to the Lord Ordinary's Interlocutor, reducing the Decreet of Circumduction so improperly and wrongously extracted; and finding these Petitioners, as representing their Father and Grandfather *Southdun*, who was served Heir to, and intromitted with the whole Effects, belonging to *James Sinclair* of *Lyth*, liable to the Re-

spendent in Payment of the Sum contained in the Bill, with Annualrent and Expences.

In respect whereof, &c.

ALEX. ELPHINSTON.

COPY of the Protest referred to in the foregoing Answers.

At Brabsterdorren, the 17th Day of April 1731, and of his Majesty's Reign the 4th Year.

WHICH Day, betwixt the Hours of Nine and Ten Beforenoon, or thereby, I *Benjamin Doull*, Notary-publick subscribing, past at the Desire of *David Sinclair*, elder, lately in *Brabsterdorren*, now in *Wester Watin*, to the personal Presence of *David Sinclair* of *Southdun*, and there exhibited and presented an Act and Commission, dated the thirteenth *January* last, in the Process and Action of Reduction, Improbation, and Declarator, depending before the Lords of Council and Session, at the Instance of the said *David Sinclair* of *Southdun*, and of his Majesty's Advocate for the Interest of the Crown, against the said *David Sinclair*, *David Sinclair* in *Whytger*, his Son, and several other Defenders, obtained by the said *David Sinclair*, elder, whereby the said Lords give and grant full Power, Warrant and Commission, to *James Budge* of *Toftingall*, and *James Campbell*, Sheriff-clerk of *Caithness*, or either of them, with Power to chuse a Clerk, for whom they shall be answerable, for taking and receiving the said *David Sinclair*, elder, his Oath, upon the Points referred to by *Southdun*, and contained in a particular Condescendence given in by him, ingrossed in the said Act and Commission; and that, at the said *David Sinclair*, elder, his House of *Wester Watin*, any lawful Day of the Months of *April* current, or *May* next, to be reported against the first of *June* also next; which Act was, on the sixteenth instant, also presented by me to the said *James Budge* and *James Campbell*, Commissioners, that they might accept thereof, and name a Day for examining the same; and they both did accept of the said Commission,

mission, and told they would attend any Day for examining thereof, that *Southdun*, the Pursuer, would name ; and therefore, I, at the Desire of the said *David Sinclair*, elder, required the said *David Sinclair* of *Southdun* to appoint a Day for taking his Oath, and that without Delay, because he was then valetudinary, and in a bad State of Health. To which the said *David Sinclair* of *Southdun* made Answer, that the Act could be examined, and *David Sinclair*'s Oath taken upon any lawful Day of *April* current or *May* next ; that he could not then instantly condescend upon any particular Day for that Purpose, but that he and the Commissioners would attend upon some lawful Day in *May*, whereof he would acquaint the said *David Sinclair*, elder and younger, some Time before ; whereupon compeared the said *David Sinclair*, younger, and represented, that, by the Act, it is declared, if the said *David Sinclair*, elder, shall die before deponing, that the Circumduction, formerly pronounced in the said Process, shall stand, and that he shall be held as confessed upon the Articles in the Condescendence referred to his Oath ; that the said *David Sinclair*, elder, being in a bad State of Health, so that it is believed by all that see him he cannot live long ; the said *David Sinclair*, younger, craved that *Southdun* might name *Monday* or *Tuesday* next, being the 19th and 20th current, for taking of his Father's Oath, in terms of the Act ; that he, the said *David Sinclair*, younger, might not be cut out from any Benefit which he might have reaped from what should be proven thereby, lest he might happen to die before deponing. To which *Southdun* answered, that he adhered to what he formerly said, that he would attend with the above mentioned Commissioners in *May*, for taking the Oath of said *David Sinclair*, elder, whereof he would previously acquaint him and the said *David Sinclair*, younger ; whereto the said *David Sinclair*, replied, that *Southdun*'s postponing the Examination of his Father, must be with a view that he may die before deponing, and that therefore he may be held as confessed, as mentioned in the Act, to frustrate the said *David Sinclair*, younger, of any Benefit he might expect thereby ; and therefore he, the said *David Sinclair*, protested, in regard the said *David Sinclair*, elder, is ready to depone upon the Articles of the Condescendence given in by *Southdun* ; that the Commissioners, named in the Act, are willing to attend and take his Oath any Day that *Southdun* shall name, and that *Southdun* nevertheless

postpones

postpones naming a Day for that Purpose, albeit the said *David Sinclair*, elder, is dangerously indisposed ; that, in case the said *David Sinclair*, elder, shall happen to die before deponing, he may not be held as confessed on the Articles of the Condescendence, as mentioned in the Act, in prejudice of the said *David Sinclair* younger, seeing he has Reason to think, that *Southdun* postpones the executing of the Act, with no other View, but that *David Sinclair*, elder, may die before deponing ; and, upon the Premises, the said *David Sinclair*, younger, asked and took Instruments in the Hands of me, Notary-publick. These Things were done upon the Ley-field, below the House of the said *David Sinclair* of *Southdun*, in *Brabsterdorren*, Day, Month, Year of God, and King's Reign, respectively foresaid, in Presence of *Alexander Sutherland* in *Brabsterdorren*, *John Sutherland* in *Southdun*, and *Thomas Bremner*, Servitor to me, Notary-publick subscribing, Witnesses specially called and required to the Premises.

A P R I L 3, 1769.

I N F O R M A T I O N

F O R

ALEXANDER SINCLAIR Portioner of *Brabsterdorran*, Pursuer,

A G A I N S T

David Threipland, and others, Defenders.

THE Lord *Barjarg*, Ordinary in this Case, having pronounced an Interlocutor in favour of the Pursuer, the Defenders reclaimed; and Answers being made to their Petition, they made an Application to the Court, for Leave to reply; on which your Lordships, on the 22d *January* 1768, pronounced the following Interlocutor: "The Lords having heard this Petition, they remit the same, together with the Petition and Answers within mentioned, to the Lord *Barjarg*, with Power to call and hear Parties Procurators therein, and to do and proceed therein as he shall see Cause."

In consequence of this there were several Pleadings before the Lord Ordinary, and different Papers were given in to his Lordship, under the Denomination of *Observes*, *Answers*, and *Replies*, at last, his Lordship made *Avifandum* to the Court, with the whole Cause, and appointed Informations to be lodged by both Parties, in obedience to which Order this is humbly offered on the Part of the Pursuer.

James Sinclair of *Lyth*, one of the Clerks to the Bills, acquired, by his own Industry, a very considerable Fortune, which, at his Death, consisted both of heritable and moveable Subjects.

Mr. Sinclair was the second of three Brothers, his eldest Brother was *Patrick Sinclair* of *Southdun*, who is represented by the Defenders in this Cause, and his younger Brother was *David Sinclair* Portioner of *Brabsterdorran*, who was Grandfather to the Pursuer.

Both these Gentlemen resided in the County of *Caithness*, where *James Sinclair* had also spent the first Part of his Life.

In *July 1721*, *James Sinclair*, as well with a view of settling some Affairs in that Country, as of visiting his Friends and Relations, from whom he had been absent for a considerable Time, went to *Caithness*, where he resided chiefly at the House of *David Sinclair*. He remained there till about the Beginning of the Year 1722, at which Time he proposed to return to *Edinburgh*, but falling ill, he died the 22d *February* that Year, without Issue.

Patrick Sinclair of *Southdun* had predeceased *James Sinclair*, but *David Sinclair*, *Patrick's* Son, was, on *James's* Death, served Heir of Conquest to him.

This *David Sinclair* having, by Means of his Agents, got Possession of *Lyth's* Papers, which remained in his House in *Edinburgh*, and having also assumed the Character of an Executor-creditor to *Lyth*, as well as that of his Heir of Conquest, he did, on these Titles, in the Year 1725, bring a general Reduction of all Deeds executed by Mr. *Sinclair* of *Lyth* in favour of any of his other Relations.

The only Reason of Reduction founded on by *Southdun*, was that of Death-bed; and as, it seems, many of these Deeds had been granted by Mr. *Sinclair* of *Lyth*, after he fell ill of the Disease of which he died, and within sixty Days of his Death, they were, after a Proof led, reduced on the Head of Death-bed.

But, among the Writs called for, in this Action of Reduction, there was a Bill for 6000 *l. Scots*, granted by *James Sinclair* of *Lyth*, to his Brother *David Sinclair* of *Brabster-Dorran*, dated 18th *October 1721*. This Bill was not subject to the Challenge of Death-bed, for which Reason, *Southdun* found it necessary to resort to some other Reason of Reduction; accordingly, he alleged, that it was granted without Value, and that the Date had been affixed to it *ex post facto*, besides some other Alterations that had been made on it, after it was accepted. Of these his Reasons of Reduction, he did, in *February 1729*, exhibit a special Condescendence in the following Terms:

1mo. That he offered to prove, by the Oath of *David Sinclair* elder, Drawer of the said Bill, that he never had any Communing or Conversation with the said deceased *James Sinclair*, the Acceptor, on or before the 18th *October 1721*, concerning the said *James's* granting a Bill for the said Sum.

2do, That the said *David* paid no Money, and gave no valuable Consideration to the said *James*, for, or upon, his granting the said Bill.

3to, That the said Bill was not signed by the said *David*, the Drawer, at or before signing the Acceptance, or at any Time before the Acceptor, *James Sinclair*'s, Death.

4to, The said Bill was not delivered to the said *David Sinclair* before the Death of the said *James Sinclair*, and that the said *David Sinclair* did not so much as see or know of the said Bill, till some time after the said *James Sinclair* his Death.

5to, That when the said Bill was first shewn to the said *David*, it did not then bear the Compellation now prefixed to it, of *Dear Brother*, and did not conclude with the Words, *Your Brother and humble Servant*, and that these Words have been added since *James Sinclair*'s Death.

6to, That the said *David* knew that the Bill was not accepted by *James Sinclair* upon 18th *October* 1721, and that he has Reason to believe, that it was accepted of a posterior Date, and that, when the said Bill was first shewn to the said *David*, it did not bear the above Date now prefixed to it, but did bear another Date, or was blank in the Date.

7mo, That the said *David Sinclair* knew that the said Bill was written by *David Sinclair*, his own Son, and that the said *David*, the Son, did present the Bill to his Father, only after the Death of *James Sinclair*, the Acceptor, that the Father might sign the Draught, and, at the same time, indorse it blank, and return it to the Son.

8vo, That the said *David Sinclair*, elder, knew and had been informed, that, before his signing the Draught, *David*, the Son, desired other Persons to sign it, as Drawer, and then to indorse it; and now that the said *David Sinclair*, the Son, and other Persons, informed the said *David Sinclair*, the Father, that the Cause and Purpose of the Defunct's accepting the said Bill, was to affect the Subject falling to the Heir of Conquest; and craved that the Defender might depone.

David Sinclair of *Brabsterdorran* would have been under no Difficulty to have deponed on this Condescendence, in such a Manner as would have been decisive of the Cause in his Favour, but he was advised by his Council, that he could not be obliged to depone upon that, or any other Condescendence which *Southdun* could

could exhibit, as the Process at that Time stood. And, accordingly, it appears, from the Minutes of Debate in the Decree of Reduction, as to the other Deeds, and in a Reclaiming Petition given in by *David Sinclair*, younger (the Pursuer's Father) and other Defenders, that they objected, that it was not competent for the Pursuer, *Southdun*, as general Heir of Conquest, to insist in a Reduction of the Deeds granted by *Ljth*, without first having shown that there was an Estate, to which, as Heir of Conquest, he could succeed, which he had not at that Time done, as there was no Law which hindered any Person to dispose of his Moveables, even gratuitously, at any Time he pleased, and for these, and many other Reasons there urged, which the Pursuers will not trouble your Lordships with repeating, the Council for *Brabsterdoran* declined taking a Day for him to depone, as was insisted on by the Council for *Southdun*; and, upon advising the Minutes of Debate, the Lord *Manzie*, Ordinary, on 12th *February* 1729, pronounced the following Interlocutor: "Sustains the Pursuer's Title, and finds that the Heir of Conquest had Right to quarrel any gratuitous Deeds granted on Death-bed, in so far as these Deeds might affect the Subject falling to the Heirs of Conquest, or to a Burden thereupon, or disappoint the Heir of Conquest of any Relief competent to him, for disburdening the Subject of his Succession; and seeing the Defender's Procurator declined, when required, to take a Day or Commission for the Defender to depone on the Reasons of Reduction above repeated, and the above Points and Qualifications referred to his Oath, held the Defender as confessed thereon, and reduced and decerned."

Brabsterdoran, it appears, was advised to apply to the Court by a Reclaiming Petition, against this Interlocutor, which he accordingly did. His Reclaiming Petition was appointed to be answered; and, on the 27th *February* 1729, the Court pronounced an Interlocutor, wherein, in so far as respected this Bill, they "found, that *David Sinclair*, who is Creditor in said Bill, ought to depone as to the Verity of the Date of the Bill, and as to the true Cause thereof, and the Time of his signing the same, and the other Articles of the Condescendence particularly narrated; or otherwise hold him as confessed, and remitted to the Ordinary on the Bills, in Time of Vacance, to grant Commission, if desired."

When

When this Interlocutor came to be considered, a good deal of Difficulty arose about carrying it into Execution. The Bill in question had, in consequence of a Settlement of *Brabsterdorrans*'s Family-affairs, been indorsed by *David Sinclair*, the elder, to *David Sinclair*, the younger, his Son; this had happened before bringing the Action of Reduction; so that the Description of *David Sinclair*, who is Creditor in the said Bill, applied expressly to *David Sinclair*, younger, and, under the Authority of that Interlocutor, no other Person could depone; at the same time, as it was the proper Facts of *David Sinclair*, elder, that were to be sworn to, it was apprehended, that the Meaning of the Court was, that *David Sinclair*, elder, should depone. As the Interlocutor, however, was pronounced on the penult Day of a Session, there was no Time for applying for a Rectification or Explanation of the Interlocutor, before the Rising of the Session; at the same Time, the Question was not without Doubt, whether *David Sinclair*, the younger, was not pointed at by the Interlocutor, as the Person who ought to depone; for as it was acknowledged on all hands, that he was the Writer of the Bill, the Article of the Condescendence, relative to the Date of the Bill, seemed proper enough to be proved by his Oath.

Instead, therefore, of extracting an Act on this Interlocutor, during the Vacation, in the Beginning of the following Session, a Petition in the name of *David Sinclair*, younger, was given into Court, praying an Explanation of the Interlocutor in this Particular. This Petition was appointed by the Court to be answered. Upon advising the Petition and Answers, the Court, by Interlocutor of Date 24th June 1729, "remitted to the Lord Ordinary to circumscribe the Term against *David Sinclair*, elder, with Power to pro-rogate the Commission formerly granted, to 20th July, and declared, that if the said *David Sinclair*, elder, should die before deponing, that the Circumduction should stand, and he be held as confessed."

In consequence of the above Remit, the Cause being called before the Ordinary, his Lordship, on the 25th June 1729, pronounced the following Interlocutor: "Circumscribes the Term against *David Sinclair*, elder, for not deponing, and holds him as confessed, and decerns; but in case he shall yet incline to depone, renews the Commission formerly granted to him to for taking his Oath, in terms of the

“ Decreet, and that at the Day of July
 “ next, to be reported the 20th Day of said Month of July, and,
 “ in terms of the Lords Interlocutor in presence, declares, that if
 “ the said *David Sinclair* should die before deponing, that the Cir-
 “ cumduction should stand, and he held as confessed.

About this Period an Accident happened, which, for some Time, put a Stop to the Process of Reduction. *David Sinclair* of *Southdun*, having, ever since his Uncle *Lyth's* Death, had Possession of the Estate both real and personal which formerly belonged to him, was, by this Addition to a considerable Estate left him by his Father, become exceedingly opulent, and endeavoured, on every Occasion, to be a Leading-man in that Part of the Country ; and having met with Opposition, in some of his Schemes, from *David Sinclair*, younger of *Brabsterdoran*, the Pursuer's Father, his Pride could not bear to be crossed by a Man whose Fortune was so inconsiderable, compared to what *Southdun* was possessed of, by the Acquisition of his Uncle's Estate ; and his Passion carried him so far, that, without any just Provocation, he violently attacked the Pursuer's Father, who, as your Lordships have been informed, was Creditor in the Bill under Reduction, in virtue of an Indersation.

In consequence of this Battery committed by *Southdun*, during the Dependence of the Action, *David Sinclair* was advised to apply by Complaint to your Lordships, which he accordingly did, and a Proof being allowed and reported, the Court, after hearing Council for several Days, on 14th November 1730, absolved *Southdun* upon this Footing, that it was not fully proven he had been the Aggressor.

The Stop which this Complaint for Battery, *pendente lite*, had created to the Proceedings in the Reduction, being removed, that Action was again called on the 13th January 1731, when the Lord Ordinary prorogated the Term for deponing, assigned to *David Sinclair*, to the 15th February thereafter ; but, upon a short Representation, setting forth the Impossibility of reporting *David Sinclair's* Oath in so short a Time, at that Season of the Year, considering it was to be taken in a remote Corner of the Country, of difficult Access, by reason of many Ferries and bad Roads, to which Representation Answers were made, by Interlocutor, of Date 24th February 1731, the Lord Ordinary “ prorogates the Time for reporting *David Sinclair's* Oath to the 1st June next, providing the Act

“ for

“ for his deponing be extracted before the 1st *April*, otherwise allows Circumduction to go out; and, in all Events, that the Quality remain as in the former Interlocutor, in case of the Death of the said *David Sinclair* in the mean time.”

In terms of the above Interlocutor, an Act and Commission was immediately extracted and sent to the Country, in order for *David Sinclair*'s deponing, upon the Condescendence formerly given in by *Southdun*; as this Act and Commission was to be executed in *Caithness*, because, at that Time, *David Sinclair* was an old infirm Man, it was necessary to name some Persons in that Country as Commissioners, and *Southdun* having the Liberty of naming his own Commissioners, appointed *James Budge* of *Toftingall*, and *James Campbell*, Sheriff-clerk of *Caithness*, two of his own intimate Friends and Companions, to be his Commissioners for taking *David Sinclair*'s Oath; and it is pretty remarkable, that, in this Act and Commission, there was not, as is usual, any Alternative to, or Power given, the Judge Ordinary, to act, in case the Commissioners should not attend.

David Sinclair having extracted the Commission, and got it sent to the Country long before the Beginning of *April*, he repeatedly applied, both to *Southdun*, and to the Commissioners named by him, desiring that they would concert among themselves, and appoint any short Day they thought proper for taking his Oath. But, after having several times made such Applications, and finding that both *Southdun* and the Commissioners wanted to shift fixing any particular Time, and, if possible, by that Means prevent *David Sinclair*'s deponing, as he was at that Time an old infirm Man, and in a bad State of Health, they imagined, that, should he die before deponing, *Southdun* would be entitled to avail himself of the conditional Circumduction contained in the Interlocutor, holding *David Sinclair* as confessed.

David Sinclair, at last, plainly perceiving *Southdun*'s Intention, and having received a Bruise by a Fall, an Accident which, to a Man in an advanced Period of Life, and otherways of an infirm Constitution, as he was, might be attended with the most dangerous Consequences, had Recourse to what appeared to him to be the properest Method for obliging *Southdun*, and the Commissioners named by him, to fix a peremptory Day for taking his Oath. On the 15th *April* 1731, he gave to *Benjamin Doull*, Notary-publick, a Mandate in the following Terms: “ You'll go to *James*
“ *Budge*

“ *Budge of Teftingall, and James Campbell, Sheriff-clerk, who are*
 “ the Commissioners named by *Southdun*, my Nephew, for taking
 “ my Oath, on the Condescendence given in by him, anent the
 “ Verity of the 6000 *l.* Bill, accepted by my Brother, payable to
 “ me, and indorsed by me to my Son, which *Southdun* raised Re-
 “ duction of; and require one or both of them to come here,
 “ without Delay, and this is your Warrant. Signed with my
 “ Hand, at *Wijffer*, 15th *April* 1731, by me, *Da. Sinclair.*”

In consequence of the above Mandate or Order, *Dzull*, the No-
 tary-publick, went the next Day, being the 16th *April*, to the two
 Commissioners, and intimated to them the Act and Commission,
 and required them, in proper Form, to appoint a short Day for
 taking *David Sinclair's* Oath; their Answer was, They were ready
 to do so when *Southdun* pleased.

Upon receiving this Answer from the Commissioners, the No-
 tary went next Day, the 17th, to *Southdun's* House, where, in Pre-
 sence of *David Sinclair* younger, (the Pursuer's Father) and other
 Witnesses, who shall be afterwards mentioned, he required *South-*
dun, under Form of Instrument, to appoint a Day for taking *Da-*
vid Sinclair elder's Oath. But, to this peremptory Demand he
 received trifling and shifting Answers, as appears, not only from
 the Protest itself, a Copy of which is hereunto annexed, but also
 from the Answers given by *Southdun* to *David Sinclair's* Conde-
 scendence after mentioned.

In the Beginning of *May* 1731, *David Sinclair* elder, the Pur-
 suer's Grandfather, died without deponing on *Southdun's* Conde-
 scendence, as, indeed, he had it not in his Power, from the Cir-
 cumstances that have been already mentioned.

After the Death of *David Sinclair* elder, *Southdun* allowed his
 Action of Reduction to lie over several Years; but, in the 1736,
 having again awakened and insisted in the same, a State was pre-
 pared, and on the 20th *June* 1736, the Lords found Death-bed
 proven, and reduced, except as to the Bill of 6000 *l.* in the Per-
 son of the Pursuer's Father.

After the Date of this Interlocutor in 1736, reducing the other
 Death-bed called for by *Southdun*, except the Bill now in question,
Southdun's Beer thought proper to extract the conditional Circum-
 stances, making *David Sinclair* elder as confessed, by Reason of
 his no deposition, which was pronounced in 1730, and again re-
 newed in the subsequent Interlocutor in 1731, allowing him to
 depone

depone betwixt and the 1st *June* then next. This conditional Circumduction was extracted by *Southdun*, without *David Sinclair*, the Pursuer's Father, or his Doer, knowing any thing of *Southdun's* Intention so to do.

In this Situation, the Pursuer's Father found himself under a Necessity of applying to the Court, to be reponed against the conditional Circumduction that had been extracted against him; and, in order to remove every Difficulty in Point of Form, at the same time did raise and bring into Court an Action of Reduction of that Circumduction, on advising a Petition preferred by him on this Occasion, with Answers for *Southdun*. On the 1st *December* 1736, the Court pronounced this Interlocutor: " Adhere to the " former Interlocutor, finding Death-bed proven, as to all Writs " craved to be reduced, except the 6000*l.* Bill, and remit to the " Lord *Monzie*, Ordinary in the Cause, to hear Parties Procurators " as to the Regularity of the Extract of the Circumduction, with " Power to determine or report."

In consequence of this Remit, the Cause having been called before the Lord Ordinary, *Southdun's* Council took advantage of the Absence of the Respondent's Council, and obtained an Interlocutor, finding the Decreet of Circumduction complained of, was regularly extracted, dismissing the Complaint, so far as it complained of said Extract, and assolzying from the Reduction.

Against this Decreet in Absence, the Pursuer's Father gave in a Representation, which the Lord Ordinary appointed to be seen and answered; and, in this Shape, did the Process lie over till the 1750.

The Pursuer's Father was from time to time amused by *Southdun*, and his Friends, with the Hopes of ending Matters amicably by a Submission, a Method he would have much rather chosen to take, than that of persisting in a Law-suit, which was no very eligible Thing for him, when he had an Opponent of such opulent Circumstances as *Southdun* was, to deal with; it required, therefore, no great Trouble to persuade him to suspend judicial Proceedings, in the view of that amicable Accommodation he was made to hope for; but, at last, being wearied out with the various Shifts of *Southdun* and his Friends, and despairing of ending Matters amicably, he resolved to bring his depending Action to a Conclusion. *Southdun*, however, getting Notice of his Intentions, and that he had actually given Orders for raising a Summons of

Wakening, thought proper to prevent him, by wakening the Process himself, which he hoped would give a Colour to his Side of the Question.

In consequence of this Wakening, and a Remit from the Court, the Cause came before the Lord *Woodhall*, as Ordinary, and Parties, on the 6th *July* 1751, appearing by their Council, *Southdun's* Procurator contended, that the Decreet of Circumduction ought to be found regularly extracted, as *David Sinclair* elder had died before deponing.

The Council for the Pursuer's Father answered, that it was evident, *David Sinclair* intended to depone, because, in terms of the Lords Interlocutors, he had extracted an Act for that Purpose, and that it was entirely owing to *Southdun's* Conduct, that he had not deponed, as neither he, nor his Commissioners, would appoint a Day for that Purpose, though often desired, and even required under Form of Instrument, (as appears from the Protest annexed) which Facts being controverted upon the Part of *Southdun*, the Council for the Pursuer's Father offered to undertake a Proof of them, but before doing so contended, that *Southdun* ought to be ordained to confess or deny, by a Writing under his Hand, certain Facts, of which, at that Time, the following Condescendence was given in, *viz.*

1^{mo}, Where did *Southdun* reside upon the 17th *April* 1731?

2^{do}, What Distance is there betwixt the Place where *Southdun* then resided, and the Place of Residence of *David Sinclair* elder of *Brabsterdorran*?

3^{to}, Did you then know, or was you informed, that the said *David Sinclair* elder was at that Time indisposed? If by what Means, or from whom, had you that Information?

4^{to}, Does it consist with your Knowledge when *David Sinclair* elder died?

5^{to}, Did you see *Benjamin Doull*, Notary-publick, and *David Sinclair* younger, upon the 17th *April* 1731?

6^{to}, Was there an Instrument of Requisition, and Protest taken against you that Day, in the Hands of the said *Benjamin Doull*, Notary-publick? At what Place, and at what Time of the Day, was that Instrument taken against you?

7^{mo}, Was the Act and Commission, which the Lords of Session had granted to *James Rudge* of *Tyferhall*, and *James Campbell*, Sheriff-clerk of *Cathness*, for taking the Oath of *David Sinclair*

clair elder, upon the Points referred by you to his Oath, then presented and intimated to you?

8vo, Was it then notified to you, that the foresaid Act and Commission had, the Day preceding, or some other Day, then recently past, been presented to the aforesaid Commissioners, in order to their appointing a Day to take the Oath of the said *David Sinclair* elder, and was not you also then told, that the said Commissioners had agreed to attend any Day that you would name for the above mentioned Purpose?

9no, Was not you thereupon required to appoint a Day for taking *David Sinclair* elder his Oath?

10mo, Was it not at the same time notified to you, that the said *David Sinclair* elder was then in such a bad State of Health, that his Life was thought to be in Hazard; and was not you therefore required to appoint the Day for taking his Oath, without Delay or Loss of Time, by Reason and upon Account of his Indisposition, and bad State of Health?

11mo, Did not you thereupon answer, that you could not then condescend upon any particular Day for that Purpose, but that you and the Commissioners would name a particular Day in the Month of *May*, when you and they would attend, and that you would give timeous Notice thereof to *David Sinclair* elder and younger? If you deny that this was your Answer, as at first made, or Words to that Purpose, you are desired specially to set forth what other Answer you did make, and the precise Words of such Answer, so far as you can recollect?

12mo, Did not *David Sinclair* younger, thereupon represent to you, that *David Sinclair* elder was in such a bad State of Health, that it was believed he would not live long? Did he not thereafter require you to appoint *Monday* or *Tuesday* then next, for taking *David Sinclair* elder his Oath?

13tio, Did not you thereupon repeat your former Answer, or Words to that Purpose, importing, that you could not then fix any particular Day, but would attend with the Commissioners upon some lawful Day in the Month of *May*, of which you would give previous Notice to the said *David Sinclair* elder and younger?

14to, Did not *David Sinclair* younger thereupon reply, that your postponing the Examination must be with a View, that *David Sinclair* elder might, in the mean time, die before deponing,
or

or Words to that Purpose? and did not he thereupon protest or insist, that as *David Sinclair* elder was ready and willing to depone, upon the several Points in the Act and Commission, and that the Commissioners named in the Act and Commission were also willing to attend, and as you then refused, or postponed, to appoint any Day for that Purpose, that therefore, in case the said *David Sinclair* elder should happen to die before deposing, he should not be held as confessed upon the Points mentioned in the Act, or in your Condescendence ingrossed in the Act?

15to, And in case you deny the several Requisitions, Answers, and Replies above mentioned, you are desired specially to set forth what other Requisitions, Answers, and Replies, were made upon that Occasion, stating the very Words, so far as you can recollect.

16to, Did you, at any Time thereafter, before *David Sinclair* elder's Death, notify to the said *David Sinclair* elder and younger, any particular Day, when you would attend for the above mentioned Purpose, or did you appoint any such Day with the Commissioners named in the Act?

To the above Condescendence on the Part of the Pursuer's Father, Answers were given in on the Part of *Southdun*, signed by one of his Council, although the Lord Ordinary's Interlocutor expressly ordered the Condescendence to be answered by a Writing under *Southdun's own Hand*.

Your Lordships will observe, that every Fact and Circumstance set forth in the Condescendence for the Pursuer's Father was such, that they must necessarily have consisted so far with *Southdun's* proper Knowledge, as to enable him to have given clear and explicit Answers, either admitting or refusing the Facts therein stated; yet, from the Answers given in, your Lordships will see how artfully he evades giving explicit Answers to many Facts, which it certainly was in his Power to have given peremptory Answers to.

The Answer to the *first* Article of the Condescendence, is as follows: That *Southdun* resided, in *April 1731*, at his own House at *Balshedderran*, where he now lives.

To the *second*, That *David Sinclair*, elder, some time in *Brabshedderran*, did, in the Month of *April 1731*, reside in *Wester Watten*, at the Distance of three Miles, or thereabouts, from *Balshedderran*.

To the *third*, That *Southdun* did not know, or hear from any Person, that *David Sinclair*, elder, then residing in *Wester Watten*, was, in the Month of *April* 1731, indisposed, and that he never had any Intimation of it, at that Time, from any Person, to the best of his Memory.

To the *fourth*, That being obliged, in the End of *April* 1731, to travel from his own House to *Inverness*, which is about sixty-five Miles, or thereby, and four Ferries, to attend the Circuit-court on the 1st *May*, as an Assizer, as he returned homeward from that Court, he was, on his Way, informed that *David Sinclair*, elder, had died about the Beginning of that Month, and that this was the first Information he had, either of his Sickness or Death, to the best of his Remembrance.

To the *fifth*, He remembers, that on some Day in *April* 1731, but upon what Day he cannot condescend, he saw *Benjamin Doull* and *David Sinclair*, younger.

To the *sixth*, He remembers, that he met with him upon the Green before his own House, but neither remembers the Day, nor the Time of the Day, nor does he remember, that there was any Instrument taken against him that Day, at that Place.

To the *seventh*, He does remember, that they discoursed about the Act and Commission mentioned in the Condescendence, but does not remember that the Act and Commission was then presented or intimated to him.

To the *eighth*, He does not remember, that it was then notified to him, that the Act and Commission had been presented to the Commissioners, in order to their appointing a Day for taking the Oath of *David Sinclair*, elder, nor that it was told him, that the Commissioners had agreed to attend any Day that he would name.

To the *ninth*, He does not remember, that he was required to appoint a Day for taking said *David Sinclair*'s Oath.

To the *tenth*, That it was not notified to him, at that Time, that *David Sinclair* was then in such a bad State of Health, that his Life was thought to be in Hazard, nor does he believe that he was therefore required to appoint a Day for taking his Oath, without Delay or Loss of Time, by reason and upon account of his Indisposition and bad State of Health, because he had not then any Account of his Indisposition from any Person.

To the *eleventh*, That, at this Distance of Time he cannot remember what passed betwixt him and the said *David Sinclair* and Ben-
jamin

James Doull concerning that Affair; but he believes it might have been to this Purpose, That he would advise with the Commissioners, and appoint such a Time as would be convenient for them to attend; and he would intimate the Time the Commissioners would appoint, to the said *David Sinclair*, younger.

To the *twelfth*, He does not believe that *David Sinclair*, elder, was in such a bad State of Health that it was believed that he could not live long, nor that he required him to appoint *Monday* or *Tuesday* then next for taking his Oath.

To the *thirteenth*, He believes, that he made no other Answer, but that he would concert with the Commissioners a proper Time for taking *David Sinclair*, elder's Oath, which he would intimate to *David Sinclair*, younger.

To the *fourteenth*, He *does not remember*, that *David Sinclair*, younger, made any Complaint upon his Answer, and he is positive, that he did not inform him, that *David Sinclair*, elder, was in a bad State of Health.

To the *fifteenth*, *Southdun* believes, that what he has above answered, will set forth all that passed upon that Occasion, betwixt *David Sinclair*, younger, and him, in Presence of *Benjamin Doull*, as far as he can recollect, after so long a Time.

To the *sixteenth*, He could not notify to *David Sinclair*, younger, any Appointment before *David Sinclair*, elder's Death, as he was obliged to be at *Inverness* so soon after their first Meeting, and that *David Sinclair*, elder, died before his Return, and as he could not conveniently meet with the Commissioners, to appoint a Meeting to take the Examination before he went for *Inverness*.

Upon the whole, *Southdun* believes, that, as *David Sinclair* younger, knew that *David Sinclair*, elder, could not emit any Deposition in his favours, if he did certainly know, that *David Sinclair*, elder, was in such a bad State of Health at the Time, that he might die before *Southdun's* Return from *Inverness*, where he knew that he was bound to attend, he would have concealed the State of *David Sinclair*, elder's Health, from *Southdun*, that he might not be examined before he died, as it appeared by every Step in this Process, he was unwilling to have him examined; and *Southdun* believes, that this Instrument was made up after *David Sinclair*, elder's Death, to favour this new Device; and though the Notary was prevailed upon to subscribe this Instrument, yet, if he had been alive, he would not have deposed upon it, and,
for

for that Reason, the Process has been delayed till after the Notary's Death, as it is well enough known by whose Influence he might have subscribed it.

Such are the Answers given in by *Southdun*; and your Lordships will observe, he acknowledges, that *David Sinclair*, younger, and the Notary-publick, *Doull*, came to him in *April 1731*; that he remembers they discoursed about the Act and Commission mentioned in the Condescendence, but does not remember that it was notified to him, or that he was required to appoint a Day for taking *David Sinclair*, elder's Oath, yet, in his Answers to the *eleventh* and *thirteenth* Articles, he expressly says, That his Answer was, that he would concert with the Commissioners, and appoint a proper Time, with them, for taking *David Sinclair*, Elder's Oath, which he would intimate to *David Sinclair*, younger, which Answer plainly shows, that he had been asked to fix on a particular Time. These Admissions are of considerable Importance, when joined to the Proof that has been taken, and they carry the greater Force along with them, that it is evident *Southdun* had no Inclination to speak out any Matter of Fact that he thought could be concealed in answering this Condescendence.

As Parties differed so widely in Point of Fact, the Lord *Woodball*, Ordinary, on the 19th *July 1753*, allowed both Parties a Proof of their different Allegations, and granted Commission for that Purpose. In consequence of which Interlocutor, a Proof was taken and reported to the late Lord *Edgefield*, who, on the 3d *August 1737*, made great Avifandum.

After this Period, there were some farther Proposals about determining Matters by a Submission, but both *Southdun* and the Pursuer's Father having died, and the Representatives of the former being Minors, these Proposals came to nothing, and the Pursuer found himself under the Necessity of wakening and transferring the Action against the Representatives of *Southdun*, which was accordingly done, and the Cause remitted to the Lord *Barjarg*, as Ordinary, in place of Lord *Edgefield*.

The Cause being called before Lord *Barjarg*, on 21st *July 1767*, the Defenders Council did not appear to debate, upon which his Lordship made Avifandum to himself, with the Proof adduced, and, on 24th *July 1767*, was pleased to pronounce the following Interlocutor: " Having considered the Proof adduced, and Remit
" by the Lords, finds it proved, that the Act and Commission was
" duly

“ duly intimated to *Southam*, and also to the Commissioners therein named, and Requisition made to them to have the Oath of *David Sinclair*, taken before the Commissioners, within some short Time, which was refused by *Southam*, and that *David Sinclair* died of the Indisposition he then laboured under, before the 1st June, and that his Oath was thereby lost by the Fault of *Southam*; that the Decreet of Circumduction was therefore improperly and wrongously extracted by him; and therefore finds the same is reducible, and reduces, decerns, and declares, in terms of the Libel.”

Against this Interlocutor the Defenders presented two Representations, one of which his Lordship refused without, and the other with, Answers, and adhered to the Interlocutor above recited.

The Defender having thereafter reclaimed to your Lordships, in consequence of that Reclaiming Petition, those Proceedings happened, which have been already recited in the Beginning of this Information, and which therefore shall not now be repeated.

Facts being thus fully stated to your Lordships, the Pursuer will now proceed to consider the Argument between the Parties.

The Question between them is a very plain one, it is no other than this, whether the Pursuer shall be reponed against a Circumduction or not, which Circumduction, he alledges, is irregularly extracted? In support of this Plea of Irregularity, he says, that a Circumduction is a penal Forfeiture of Proof, on account of the Fault or Neglect of a Party, in not using it when it was allowed him; that wherever it is shewn, that no Fault or Neglect is committed, the penal Consequence ought not to follow; and, accordingly, that wherever either Accident, or the Fault of the other Party, can be alledged, to shew that the Party against whom Circumduction has been obtained, was entirely innocent, your Lordships, in these Cases, are in use to repon Parties against a Circumduction, and to allow them still to be heard.

In the present Case, Matters are yet more favourable for the Pursuer than they are in general, when Circumductions have been granted; for, in the Process in which this Circumduction was obtained, the *onus probandi* lay with the present Defender, at least with his Predecessor, *Southam*; so that, upon his failing to prove particular Facts, he must have succumbed in his Process.

The Mean of Proof he chose to resort to, was that of the Oath of his Opponent, it was therefore incumbent on him to have done every

every thing to forward his own Proof, and if, instead of this, by any Act or Deed of his, it hath happened that the Oath of his Opponent hath not been taken, he is doubly to blame, on this Footing, that it is the Duty of a Pursuer to extricate his own Proof, whatever Mean of Proof he chooses to resort to. The Law hath declared, that when a Pursuer refers Facts to a Defender's Oath, it is incumbent on him to furnish the Act on which the Defender is to depone, and if he refuses so to do, the Defender is intitled to be dismissed without deponing, the Pursuer being denied the Benefit of his Oath. The Case is much stronger, where the Pursuer does any thing by which the Defender is absolutely prevented from deponing, in terms of the Reference.

The Defenders found their Defence chiefly on this, that the Pursuer's Father was *in mora*, previous to the 1731, having fallen upon various Devices to prevent *David Sinclair*, elder, being examined. But the Pursuer does humbly contend, that this Allegedance is neither relevant in Law, nor well supported in Point of Fact.

That it is not relevant in Law, they contend, because, whatever Delays may have happened on the Part of *David Sinclair*, previous to the last Interlocutor of the Court, allowing him still to be examined; as these were not judged by the Court to be sufficient for depriving him altogether of the Benefit of his Oath, so they will prove no Apology for any subsequent Proceedings on the Part of *Southdun*, tending to deprive him of that Benefit; he being still indulged by the Court with an Opportunity of deponing, it was the Duty of *Southdun*, who had resorted to his Oath as his Mean of Proof, to have co-operated with him, in affording him an Opportunity to depone, and not to have endeavoured, by shifting the Occasion of examining him, when it was in his Power, to lay hold of a conditional Circumduction, in the Case of his dying without deponing. Whatever Fault or Neglect therefore, or whatever tortious Proceeding appears on the Part of *Southdun*, after the Respondent's Father had been indulged in the full Benefit of *David Sinclair*'s Oath, in case of his actually deponing, cannot avail *Southdun*'s Representatives, but, on the contrary, must afford a good Objection to their laying hold of the Consequences produced thereby, for their own Benefit.

In Point of Fact, on what is already said, the Pursuer does submit it to your Lordships, if, previous to the Time of old *David*

Sinclair's Death in the 1731, there is any Delay that did not, in effect, proceed from *Southam* himself.

And your Lordships will observe, that after the 1729. when the Interlocutor was pronounced, appointing *David Sinclair*, elder, either to depone upon *Southam's* Condescendence, or holding him as confessed, in case of his dying without deponing, *Southam* and the Pursuer were by no Means upon equal Terms, because, could *Southam* by any Means have prevented *David Sinclair* from deponing, without appearing to have had any Hand in that Delay himself, he would have had an excellent Plea for holding him as confessed in terms of the Interlocutor, in which, had he been successful, it would have been decisive of the Cause in *Southam's* favours.

On the other hand, it was clearly the Pursuer's Interest that *David Sinclair* should depone, to prevent the Circumduction's taking place, and, accordingly, your Lordships see him taking every Step possible to bring that Matter to an Issue.

Immediately after the Interlocutor 1731 was pronounced, the Pursuer's Grandfather, at a large Expence, extracted an Act and Commission, from which it is evident, that he seriously intended to depone upon the Facts referred to his Oath; and when, by repeated Applications, he could not bring *Southam*, nor the Commissioners, to fix any Time, he writes a formal Mandate to a Notary-publick, requiring him to go and desire *Southam* and the Commissioners to come and examine him. In consequence of which the Notary goes, and, under Form of Instrument, expressly requires, first, the Commissioners, and then *Southam*, to come and take his Oath, which they declined to do. What, in that Situation, could *David Sinclair* do? Your Lordships have been informed, that the Commission contained no Alternative for the Judge-ordinary to act, as usual; so that, every Circumstance considered, the Pursuer submits it to your Lordships, if *David Sinclair* did not take every Method he possibly could, to force *Southam* to cause execute the Act and Commission, and that it was entirely the Fault of *Southam* himself, that *David Sinclair* elder was not examined.

In a Note subjoined to the End of the Petition, it is observed, that *David Sinclair's* Mandate was directed to no Person. In the first place, there was no Occasion for a Direction, as it was delivered by Mr. *Sinclair* himself into the Notary's Hand; but farther,

it is evident from the Oath of *Patrick Doull*, the Notary's Brother, that this Mandate was delivered to *Doull*, and that, in consequence of it, he took the Protest in Process; for he expressly depones, "That he found among the Papers of the deceased *Benjamin Doull*, which are now in his Keeping, a Paper marked on the Back, *Scroll Instrument*, David Sinclair against Southdun, with old David's Mandate, 17th April 1731; and inclosed within this Paper was another Paper, subscribed *David Sinclair*, dated 15th April 1731 Years, which the Deponent believes to be the Paper which is called the Mandate, both which Papers he produces before the Commissioners, and they are both signed on the Back by himself, the Commissioners and Clerk."

This Paper, marked as above described, is the original Mandate given by old *David Sinclair* to *Doull* the Notary, and is in Process, and this clearly shews, that it was in consequence of the Mandate, that *Doull* the Notary took the Protest against *Southdun* and the Commissioners, and that it was taken at the Time contended for by the Pursuer, as your Lordships will observe, that the Scroll, found among *Doull's* Papers, bears Date 17th April 1731. This exactly agrees with what the Pursuer has all along averred, and what he humbly hopes will evidently appear to your Lordships to be true, from the Proof adduced. But it exceedingly ill agrees with *Southdun's* Allegation, that this Story of the Protest was all a Piece of Cookery betwixt *David Sinclair* younger and the Notary; for, had that been the Case, the Notary surely never would have been allowed to keep Possession of the original Mandate, from the 1731 down to the 1753, when it was found among his Papers, by his Brother, after his Decease, and by him produced to the Commissioners.

As to what is further said in the Note at the End of the Petition, that the Mandate is wrote with different Ink from the Subscription, the Pursuer, from Inspection, sees not the least Reason for the Alledgeance, although he does not think it could be of great Consequence to either Party, was it, as the Petitioners alledge, for nothing is more common, than for Subscriptions to be wrote in a different Ink from the Body of a Writing; even the Change of a Pen will sometimes occasion an apparent Difference in Matters of this Kind.

The Pursuer shall now very shortly state to your Lordships, that Part of the Proof, which, he apprehends, puts it beyond a Doubt, that

that it was entirely owing to the Fault of *Southdun* and his Commissioners, that *David Sinclair* elder was not examined before he died. And,

In the *first place*, He begs leave to submit to your Lordships Consideration, the Protest taken by *Doull* the Notary, in consequence of the Mandate above mentioned, an exact Copy of which Protest is hereto annexed, and from which your Lordships will see, that the Facts, as there stated, precisely correspond with what has been all along advanced upon the Part of the Pursuer, and clearly corroborated by the Proof.

The Defenders have said, that this Instrument cannot be admitted as sufficient Evidence, and that it would appear to be false in all the material Circumstances, from the Proof adduced. But the Pursuer cannot discover one single Circumstance of the smallest Consequence, that is mentioned in the Protest, that is in any Degree contradicted by the Proof now adduced; but, on the contrary, that the Protest is clearly supported by the Proof, in every Circumstance of the least Consequence, and even in a great Measure corroborated by what *Southdun* himself admits in his Answers to the Condescendence given in for *David Sinclair*, the Pursuer's Father.

Your Lordships will observe, that *Southdun*, in the Answers he gave to the Pursuer's Condescendence, acknowledges, that *David Sinclair* younger was at his House in *April 1731*, along with *Doull* the Notary, and that he remembers they discoursed about the Act and Commission, and that he, *Southdun*, gave them for Answer, that he would concert with the Commissioners a proper Time for taking *David Sinclair* elder's Oath, and notify the same to *David Sinclair* younger.

In the Pursuer's Apprehension, nothing can be a stronger Corroboration of the Verity of the Protest, than these very Admissions of *Southdun's*; for *David Sinclair* younger, the Pursuer's Father, and *Southdun*, were not at that Time in so great Friendship as to visit one another; and, indeed, the Pursuer cannot figure for what Purpose *Doull*, the Notary-publick, would have been brought there, unless it had been to take the Protest now produced; and yet, that he was at *Southdun's* House in *April 1731*, along with *David Sinclair* younger, and that they discoursed together about the Act and Commission, is admitted by *Southdun* himself.

But,

But what puts the Authenticity of the Protest beyond all Doubt, is the Proof; *James Budge of Toftingall*, one of the Commissioners named in the Act by *Southdun*, depones, "That upon a certain Day, but in what Month, or in what Year, the Deponent does not remember, the Pursuer (*i. e.* the Memorialist's Father) and *Benjamin Doull*, Notary-publick, came to his House at *Gerth*, and intimated to him an Act and Commission, for taking the Pursuer's Father's Oath, as far as he can remember. Depones, that he does not remember that *Benjamin Doull*, the Notary, required a short Day for examining the Pursuer's Father, because he was sick, but remembers that he agreed to accept of the Commission. And depones, that at that Time he heard, that the Pursuer's Father had broke his Arm, but did not hear of any other Ailment about him. Depones, that he does not remember that he told the Notary, that he was ready to examine him, when *Southdun*, the Defender, called him; but knows that he was willing to accept the Commission, and examine in terms of the Act. And depones, that the Pursuer and the Notary told the Deponent, that they had come from Mr. Campbell's, and thinks they told him that they had intimated the Commission to Mr. Campbell."

It is true, that Mr. *Campbell's* Oath resolves into a mere *non memini*; for he says, that he remembers nothing at all about the Act and Commission, although your Lordships see, that Mr. *Budge* expressly swears, that the Notary told him he had come from Mr. *Campbell's* to his House. Now, a *non memini* is a very different Thing from a mere negative Evidence, and, instead of creating any Presumption against the Fact offered to be proved, when any other Evidence appears in support of those Facts, those Witnesses who confess a Failure of their Memory, are to be presumed to be concurring Witnesses, in case their Memory had served them.

John Sutherland, one of the Instrumentary-witnesses, who was, at the Time of taking the Instrument, Ground-officer to *Southdun*, and has resided ever since upon his Estate, and cannot therefore be suspected of any improper Bias in favour of the Pursuer, depones, "That having seen an Instrument taken in the Hands of *Benjamin Doull*, Notary-publick, to which he is a subscribing Witness, which Instrument is marked on the Back by the Commissioner, Deponent, and Clerk, and having heard the Instrument read, depones, he subscribed that Instrument." He, indeed,

afterwards says, that he did not hear what passed at the Time of taking this Instrument, being at a little Distance. And, upon his after Examination, he deposes, " That he saw the present Pursuer's Father, *Southdun*, and the Notary-publick, about a Place called " the *Old Garden*, below *Southdun's House*." This exactly agrees with the Instrument of Protest itself, which expressly bears, that it was taken " on a *Ley-field*, a little below *Southdun's House*."

Thomas Bremner depones, " That, about twenty-two Years ago, " the Deponent was sent by *Benjamin Doull*, then his Master, to " the Pursuer's House, for him to meet him upon a *Ley-field*, below " *Southdun's House* in *Brabster*; and depones, That he saw *Southdun* and his Master walk down to that *Ley-field*, and saw the " Pursuer meet them there; and depones, That he saw the Pursuer have a Paper in his Hand, about the Bigness of the present " Act and Commission, now shewn to him; and depones, That, " to the best of his Remembrance, it was about taking the Pursuer's Father's Oath, who was lying, at that Time, bad upon " his Death-bed; and depones, That he saw the Pursuer take Instruments in his Master's Hands, and require *John Sutherland*, " who was then *Southdun's* Officer, and another *Sutherland*, whom " he does not know, and another Man whom he does not know, " Witnesses at the taking of the Instrument; that he was required " as a Witness himself, but could not subscribe the Instrument, " as he could not write; and depones, That, in that Year, he " went with the Pursuer, and his Master, to the House of Mr. " *Campbell* of *Thurso*, and of *Testingall's* at *Gerth*, and he saw that " Paper which his Master presented to *Southdun*, in his Master's " Hands, and he believes that their Business was, to intimate that " Paper to Mr. *Campbell* and *Testingall*, but as he had not Access " to go up Stairs in the Gentlemens Houses, he did not see that " Paper intimated to them, but he heard that it was intimated to " them."

This Witness expressly says, That he heard his Master, the Notary, require the former Witness, *Sutherland*, to be an Instrumentary-witness; *Sutherland* himself expressly swears, That he actually did sign the Instrument now in Process, but says, he was not required to do so. Which of these Witnesses deserve most Credit, as to this Circumstance, the Pursuer will leave with your Lordships, with this single Observation, that *Bremner* is perfectly unconnected with

with either Party, and that *Sutherland* has been a kind of menial Servant to *Southdun* since the Year 1719.

The Defenders have said, that *Bremner*, in his Oath, makes the Notary first go to *Southdun*, and afterwards to the Commissioners, although the Protest appears to be taken against the Commissioners on the 16th, and against *Southdun* on the 17th. The Pursuer must acknowledge, that, after considering *Bremner's* Deposition, he cannot find a single Circumstance in it which can intitle the Defenders to put the Construction on it they do; for in no Part of that Oath is it said, that the Notary went to *Southdun*, prior to his going to the Commissioners; but as the Deposition itself is inserted above, the Pursuer will leave it with your Lordships.

The Proof now under your Lordships Consideration was taken in 1753. *Bremner* depones, That the several Facts mentioned in his Deposition happened about twenty-two Years before the Time of his emitting the same, which brings it exactly down to 1731, the Time that the Protest was actually taken, and in this he is corroborate by Mr. *Budge* of *Toftingall*, who expressly depones, That *Doull*, the Notary, came to his House at *Gerth*, and intimated an Act and Commission for taking old *David Sinclair's* Oath; but cannot particularly condescend upon the Period that this happened, although it must unquestionably have been in *April* 1731, because there was no Act and Commission extracted for *David Sinclair's* deponing, till *March* 1731, and *David Sinclair* died the first Week of *May* immediately thereafter; so that it could have been at no other Period, that this Act and Commission was intimated to *Toftingall* but in *April* 1731, when the Protest was taken.

All the Witnesses adduced expressly depone, that *David Sinclair*, elder, had, in *March* 1731, got a severe Hurt in his Arm, which confined him to his House from that Period till his Death, and yet, in the Answers given in by *Southdun* to the Condescendence, he has said, that he never heard of his being bad, although he only lived at the Distance of three Miles from him. This appears not a little extraordinary, as in that Part of the Country, People of three Miles Distance look upon themselves as next-door Neighbours.

There is one Circumstance acknowledged by *Southdun* himself, which, in the Pursuer's humble Apprehension; must clearly shew, that *Southdun* was not so anxious to have old *David Sinclair's* Oath taken, as he now endeavours to persuade your Lordships he was.

Your

Your Lordships have seen, all along, that *Southdun* himself considered *David Sinclair*, elder, to be in a valetudinary State of Health; from the very Commencement of his Process in 1725, you see him admit, in his Answers to *David Sinclair's* Condescendence, that, in April 1731, he converted with *David Sinclair*, younger, and the Notary-publick, about appointing a Time for examining old Mr. *Sinclair*, which, however, he thought proper to shift and put off, when, at the same time, he tells your Lordships, that, in a few Days thereafter, he was to undertake a long and tedious Journey to *Inverness*, cross several Ferries, &c. from which Place the Time of his Return was uncertain. Now, is it possible for your Lordships to believe, that had *Southdun* been anxious to have *David Sinclair* examined, he would have undertaken such a Journey, before he had taken his Oath, in terms of the Act and Commission. This could have been attended with no Inconvenience to him, had he really intended that he ever should be examined, for he resided within three Miles of *David Sinclair's* House, the Commissioners were at hand, and it could not have taken up the Space of an Hour to finish all the Business that was wanted.

Indeed, the Excuse itself is but a very lame one; the Journey, it is said, *Southdun* was obliged to take to *Inverness*, was in consequence of his being cited to attend the Circuit-court as a Jurymen; the Consequence of his Non-attendance, every body knows, could have been nothing else but a small Fine of 100 Merks, the greatest Part of which would be expended on his Journey; so that, had he been very anxious to have taken *Brabsterdoran's* Oath, he might have staid at home and done it at a very trifling and inconsiderable Expence.

This Conduct of *Southdun's* does by no means agree with what is pleaded on the Part of the Defenders, but it corresponds exactly with what is insisted on upon the Part of the Respondent, viz. that *Southdun* wished for nothing so much as that *David Sinclair* should die without being examined, and accordingly your Lordships see the old Man dies in the Beginning of May, before *Southdun's* Return from *Inverness*.

The Defenders have said, that *David Sinclair* took the Advantage of *Southdun's* Absence, to elicit the several Deeds from *Isth* that were called for in the Reduction; but this is a Misrepresentation in Point of Fact, for *Southdun* was in *Caithness* with his Uncle *Isth*, at the Time of his Death, which was expressly acknowledged

knowned and insisted upon by *Southdun* himself, in his Action of Reduction, as appears from the Decree.

It hath been pretended on the Part of the Defenders, that no Account can be given how *David Sinclair* came to be possessed of so large a Sum as that contained in the Bill, or what Occasion *Lyth* could have to borrow it. But although the Pursuer does not think he is under any Obligation to account for this Matter, or to give a Detail of all the Particulars of any Transaction between *Lyth* and his Predecessor, at this Distance of Time, yet, in Fact, he apprehends he hath given a very satisfactory Account of this Matter, and it is this:

In Autumn 1721, when *Lyth* came to *Caithefs*, he found that his Brother *David Sinclair*, elder, the Drawer of the Bill in dispute, and Grandfather to the Pursuer, had a Claim for a larger Sum than that contained in the present Bill, against one *George Sinclair*, then living in *Lybster*, who was a Friend and Intimate of *Lyth's*; *Lyth* wanted to relieve his Friend, *George Sinclair*, of the Debt; and, at same time, indemnify his Brother *David Sinclair* for his Claim upon *George*, and, in order to do so, he gave *David* the Bill now in question, who thereupon delivered up the Vouchers of his Claim against *George* into *Lyth's* Hand, who afterwards gave them up to *George Sinclair* himself; but, on doing so, he made *George* come under a Back-bond to him, which Back-bond the Pursuer believes to be in the Hands of some of the Defenders at this Day.

Upon the whole, the Pursuer hopes, that after your Lordships have considered the Instrument of Protest hereto annexed, the Proof led in support of the Facts stated in that Instrument, and whole Circumstances of the Case, there will not a Doubt remain that *Southdun*, and the Commissioners, were expressly required to take *David Sinclair*, elder's Oath, and that the not doing so was entirely owing to *Southdun*; and when your Lordships see how willing the old Man was to depone, whose Character, even by *Southdun*, is admitted to be unexceptionable, you can as little doubt, that his Oath would have been decisive in the Pursuer's favours; and as *Southdun*, exclusive of his Family-estate, fell into the considerable Fortune belonging to *Lyth*, and as neither the Pursuer, his Father, nor Grandfather, ever had a Farthing Value from *Lyth's* Effects, although your Lordships see *Lyth* living in the greatest Intimacy with his Brother *David Sinclair*, the Pursuer humbly hopes your Lordships will have no Difficulty in adhering to the Lord Ordinary's

nary's Interlocutor, reducing the Decreet of Circumduction, so improperly and wrongously extracted, and finding the Defenders, as representing their Father, and Grandfather, *Southdun*, who was served Heir to, and intromitted with, the whole Effects belonging to *James Sinclair of Lyth*, liable to the Pursuer, in Payment of the Sum contained in the Bill, with Annualrent and Expences.

In respect whereof, &c.

ANDREW CROSBIE.

COPY of the Protest referred to in the foregoing Information.

At Brabsterdorren, the 17th Day of April 1731, and of his Majesty's Reign the 4th Year.

WHICH Day, betwixt the Hours of Nine and Ten before Noon, or thereby, I *Benjamin Doull*, Notary-publick subscribing, past, at the Desire of *David Sinclair*, elder, lately in *Brabsterdorren*, now in *Wester Wattin*, to the personal Presence of *David Sinclair of Southdun*, and there exhibited and presented an Act and Commission, dated the thirteenth *January* last, in the Process and Action of Reduction, Improbation, and Declarator, depending before the Lords of Council and Session, at the Instance of the said *David Sinclair of Southdun*, and of his Majesty's Advocate for the Interest of the Crown, against the said *David Sinclair*, *David Sinclair* in *Whyliger*, his Son, and several other Defenders, obtained by the said *David Sinclair*, elder, whereby the said Lords give and grant full Power, Warrant, and Commission, to *James Budge of Tostinall*, and *James Campbell*, Sheriff-clerk of *Caithness*, or either of them, with Power to chuse a Clerk, for whom they shall be answerable, for taking and receiving the said *David Sinclair*, elder, his Oath, upon the Points referred to by *Southdun*, and contained in a particular Condescendence given in by him, ingrossed in the said Act and Commission; and that, at the said *David Sinclair*, elder, his House of *Wester Wattin*, any lawful Day of the Months of *April* current, or *May* next, to be reported against the first of *June* also next; which Act was, on the sixteenth instant,

also

also presented by me to the said *James Budge* and *James Campbell*, Commissioners, that they might accept thereof, and name a Day for examining the same; and they both did accept of the said Commission, and told they would attend any Day for examining thereof, that *Southdun*, the Pursuer, would name; and therefore, I, at the Desire of the said *David Sinclair*, elder, required the said *David Sinclair* of *Southdun* to appoint a Day for taking his Oath, and that without Delay, because he was then valetudinary, and in a bad State of Health. To which the said *David Sinclair* of *Southdun* made Answer, that the Act could be examined, and *David Sinclair's* Oath taken upon any lawful Day of *April* current, or *May* next; that he could not then instantly condescend upon any particular Day for that Purpose, but that he and the Commissioners would attend upon some lawful Day in *May*, whereof he would acquaint the said *David Sinclair*, elder and younger, some Time before; whereupon compeared the said *David Sinclair*, younger, and represented, that, by the Act, it is declared, if the said *David Sinclair*, elder, shall die before deponing, that the Circumduction, formerly pronounced in the said Process, shall stand, and that he shall be held as confessed upon the Articles in the Condescendence referred to his Oath; that the said *David Sinclair*, elder, being in a bad State of Health, so that it is believed by all that see him he cannot live long, the said *David Sinclair*, younger, craved that *Southdun* might name *Monday* or *Tuesday* next, being the 19th and 20th current, for taking of his Father's Oath, in terms of the Act; that he, the said *David Sinclair*, younger, might not be cut out from any Benefit which he might have reaped from what should be proven thereby, lest he might happen to die before deponing. To which *Southdun* answered, that he adhered to what he formerly said, that he would attend with the above mentioned Commissioners in *May*, for taking the Oath of said *David Sinclair*, elder, whereof he would previously acquaint him and the said *David Sinclair*, younger; whereto the said *David Sinclair* replied, that *Southdun's* postponing the Examination of his Father, must be with a view that he may die before deponing, and that therefore he may be held as confessed, as mentioned in the Act, to frustrate the said *David Sinclair*, younger, of any Benefit he might expect thereby; and therefore he, the said *David Sinclair*, protested, in regard the said *David Sinclair*, elder, is ready to depone upon the Articles

of the Condescendence given in by *Southdun*; that the Commissioners, named in the Act, are willing to attend and take his Oath any Day that *Southdun* shall name, and that *Southdun* nevertheless postpones naming a Day for that Purpose, albeit the said *David Sinclair*, elder, is dangerously indisposed; that, in case the said *David Sinclair*, elder, shall happen to die before deponing, he may not be held as confessed on the Articles of the Condescendence, as mentioned in the Act, in prejudice of the said *David Sinclair*, younger, seeing he has Reason to think, that *Southdun* postpones the executing of the Act, with no other View, but that *David Sinclair*, elder, may die before deponing; and, upon the Premises, the said *David Sinclair*, younger, asked and took Instruments in the Hands of me, Notary-publick. These Things were done upon the Ley-field, below the House of the said *David Sinclair* of *Southdun* in *Brabsterdorren*, Day, Month, Year of God, and King's Reign, respectively foresaid, in Presence of *Alexander Sutherland* in *Brabsterdorren*, *John Sutherland* in *Southdun*, and *Thomas Bremner*, Servitor to me, Notary-publick subscribing, Witnesses specially called and required to the Premises.

[Lord BARJARG Reporter.]

A P R I L 25, 1769.

INFORMATION

F O R T H E

Heirs and Representatives of the deceased *David Sinclair* of *Southdun*, Defenders;

A G A I N S T

Alexander Sinclair Portioner of *Brabsterdorran*, Pursuer.

ALEXANDER SINCLAIR, Portioner of *Brabsterdorran*, insists in a Process of Reduction of a Decreet of Reduction, Improbation, and Declarator, obtained by the deceased *David Sinclair* of *Southdun* against *David Sinclair* elder, and *David Sinclair* younger of *Brabsterdorran*, the Pursuer's Grandfather and Father, as far back as the Year 1729; whereby, upon the said *David Sinclair*, the Grandfather's being held as confess, upon certain Facts referred to his Oath, respecting a Bill of no less than 6000 *l. Scots*, said to be dated, 18th *October* 1721, drawn by the said *David Sinclair* elder upon, and accepted by *James Sinclair* of *Lyth*, one of the Clerks of the Bills, Decreet of Reduction was pronounced and extracted in 1736: And, after various Proceedings, unnecessary

A

necessary to be stated, the Lord *Barjarg* Ordinary, having taken the Cause to Report, this Information is humbly offered on the Part of the Defenders. And, if they are not greatly deceived, it will appear to your Lordships, upon a fair State of the Case, that supposing the Question respecting the Validity of said Bill, were still entire, the Exceptions which lie against it, are so strong, it could not possibly be sustained as the Ground of Action against the Defenders, who, as in Right of *Southan*, are now the Representatives of *James Sinclair of Lyth*, the supposed Granter of said Bill. But as the Bill stands reduced by a Decree of this Court, as far back as the 1729, the primary Point for your Lordships Consideration is, how far that Decree can now be laid open, upon the Exception that is taken thereto, respecting the Way and Manner in which the aforesaid *David Sinclair* the elder, was concluded, by his being held as confess, upon the Facts referred to his Oath, and his Failzie or Neglect to depone thereanent.

The Facts necessary for understanding this Cause, are as follow :

James Sinclair of *Lyth*, Clerk to the Bills, died upon the 20th *February* 1722, possessed of a considerable Estate, partly heritable, partly moveable, all of his own Acquisition.

James Sinclair had no issue, and being the Middle of three Brothers, *David Sinclair* of *Southan*, the Son of the immediate elder Brother, was his undoubted Heir of Conquest and of Law, and had all along been acknowledged by his Uncle, as the Person he intended to be his universal Heir and Successor.

In *February* 1722, *James Sinclair* was seized with that Distemper of which he died upon the 20th of that Month, after a few Days Illness; and as his Nephew, *Southan*, happened then to be absent, *David Sinclair* of *Bradfordston*, *James's* immediate younger Brother, and Heir of Law, as-

isted

lified by his Son, *David Sinclair*, the younger, taking Advantage of the weak State and Condition to which *James Sinclair* was then reduced, laid hold of that Opportunity, of eliciting from him, upon the 14th, 16th and 17th Days of said Month, a Variety of Deeds, which, if they could have been supported, would have evicted the whole Estate from *Southdun*, the right Heir.

There was no Possibility of antedating these Deeds, because they were of such a Nature, that *James Sinclair*, in the weak State and Condition, to which he was then reduced, was incapable to write them with his own Hand. So that a Writer and instrumentary Witnesses, behoved of necessity to be adhibited, which therefore behoved to stand the Chance of *James Sinclair's* outliving the sixty Days, an Event which was not likely to happen, as in Fact he died the 3d Day after the last of these Deeds; but anxious to secure something, in all Events, it occurred that the most effectual Measure, was to take a Bill from the poor dying Man, to which they could affix any Date they thought proper.

The Bill in question was accordingly made out, of the Hand-writing of *David Sinclair* the younger, for no less a Sum than 6000*l. Scots*, and which was made to bear Date the 18th *October* 1721, in order to avoid the Exception of its being granted on Death-bed, and to which *James Sinclair* is said to have adhibited his Subscription.

The Bill itself is of the following Tenor : “ Brother, “ *Brabster*, 18th *October*, 1721.—Betwixt the Date hereof, “ and *Lammas* next to come, pay to me, or my Order, with- “ in the Dwelling-house of *James Campbell*, Sheriff-clerk of “ *Caitbness*, the Sum of 6000*l. Scots* Money, *Value of mine in “ your Hands*; make Payment, and oblige your Brother and “ humble Servant, *David Sinclair*.—Addressed thus : For “ Mr. *James Sinclair* of *Lyth*.—Accepts, *James Sinclair*.”

Independent of all other Exceptions which lie to this Bill, it is of very suspicious Appearance. The Place and Date evidently

vidently superinduced *ex post facto*, and of a much deeper Character than the Body of the Bill; to palliate which, sundry of the Words of the Bill itself, appear to have been blackened in their Character, in order to conceal the apparent Discrepancy of the Place and Date from the Bill itself, of which your Lordships will be satisfied upon Inspection of the Bill. But what chiefly merits your Lordships Attention, is the alledged onerous Cause specified in the Bill itself, *viz. Money, Value of mine in your Hands*, whereby *James Sinclair* was made to confess himself to be Debtor to his Brother *David* in that Sum, and to have granted this Bill in Satisfaction of that Debt, though it stands now confessed, that this was an absolute Falshood, and which is an additional Circumstance, of no small Weight, to shew the Fraud and Imposition, that must have been practised, in eliciting this Bill, if the Acceptance thereto adhibite, shall be supposed to have been *James Sinclair's* genuine Subscription.

Though this Bill was made to bear Date the 18th *October* 1721, it was never heard of, nor seen by, any Mortal till after *James Sinclair's* Death, and to this Hour, no Account can be given, either by what Means *David Sinclair* should have been possessed of so large a Sum, or what Occasion *James Sinclair*, a moneyed Man, could have had to borrow the same, though by the Conception of the Bill, he was made to confess himself Debtor to his Brother *David* in that Sum. And it is particularly to be remarked, that, throughout the whole Course of the judicial Proceedings, to be in the Sequel stated, it was repeatedly charged on the Part of *Southam*, as one of the special Reasons of Reduction of said Bill, that it was merely gratuitous, without any valuable Consideration whatever. *David Sinclair*, the supposed Creditor in the Bill, was so far from alledging any onerous Cause, that he in effect admitted it to be merely gratuitous, and maintained this very extraordinary Proposition, that, supposing it to have been granted in Death-bed, the Death-bed Law was not meant to restrain the

the

the dying Person, from granting even *gratuitous* Deeds in favour of the Heir of Line, though to the Prejudice of the Heir of Conquest.

But the now Pursuer, aware of the Objection which, independent of Deathbed, would lie to this Bill, supposing it to be a Donation, has adventured to assign another Cause therefor, contradictory to the Bill itself, which, supposing it to be true, would be equally fatal to the Bill, and which, therefore shall be given in the Pursuers own Words, *viz.* "In Autumn, 1721, when *Lyth* came to *Caitbness*, he found that his Brother, *David Sinclair* elder, the Drawer of the Bill in dispute, had a Claim for a Sum larger than that contained in the present Bill, against one *George Sinclair*, then living in *Lybster*, who was a Friend and Intimate of *Lyth's*.—*Lyth* wanted to relieve his Friend, *George Sinclair*, of the Debt, and at the same Time indemnify his Brother *David Sinclair* for his Claim upon *George*, and in order to do so, he gave *David* the Bill now in question, who thereupon delivered up the Vouchers of his Claim against *George* into *Lyth's* Hands, who afterwards gave them up to *George Sinclair* himself, and on doing so, he made *George* come under a Back-bond to him."

This Account of the supposed Transaction between *James Sinclair* and *David*, is in itself highly incredible, unsupported by any the least Evidence, and contradictory to the Tenor of the Bill itself. But allowing, for Argument's sake, that such truly had been the Fact, the Defenders are advised, and submit it to your Lordships, upon the established Principles of Law, that the Bill, said to be granted, as the Result of that Transaction, could not have been supported, as a Voucher of Debt against *Lyth's* Representatives. The extraordinary Privileges which the Laws and Practice of Nations have conferred upon Bills, of being probative, by the bare Subscription of the supposed Acceptor, without any of the legal Solemnities required to other

Writings, to render them probative and obligatory, were intended merely for the Benefit of Trade and Commerce.

But how stands the Fact? According to the Account which the Pursuer now gives of this Transaction, *James Sinclair* did not receive *one Penny* for accepting this Bill; he was *not* Debitor in one Farthing to his Brother *David*, though the Bill was falsely made to acknowledge the same, but meaning to confer a Gratuity upon one *George Sinclair*, against whom *David Sinclair* is said to have had a considerable Claim, for a Sum, at least equal to the 6000 *l.* *James Sinclair* is so extremely generous, as to grant his own accepted Bill to his Brother *David*, in Satisfaction to *David* of the equivalent or greater Sum, in which *David* is said to have been Creditor to *George*. This is such an extraordinary Piece of Generosity, as is seldom to be met with, even where there is Cause for it, and the more incredible in this Case, that *James Sinclair* had all alongst been most intent to transmit his whole Succession to his Nephew and Heir, *Southdun*. But, be that as it will, as your Lordships have, upon all Occasions, been studious to confine Bills within their proper Sphere, this Bill could not be supported, was the Question still entire.

This Bill is liable to another obvious Objection, that, in a Question with *Southdun*, the Heir of Conquest, or his Representatives, it is not probative of its Date, the Presumption of Law being, that it was granted upon Death-bed, and antedated. And, independent of *David Sinclair*'s being held as confessed upon that, and other Facts, there is the strongest Appearance, both from the Completion of the Bill itself, and a Variety of other Circumstances, in the Sequel to be stated, that such truly was the Case, however artfully endeavoured to be disguised.

And as these dark Operations generally come to Light in one Shape or other, it soon transpired, and was universally believed, that, when this Bill was presented to *James Sinclair*, *Senatus*, to be by him signed, it was wrote out in such
a Hurry,

a Hurry, that it bore neither Place nor Date, nor the Creditor's Name, nor the Subscription of the Drawer, and that it was not till after *James Sinclair's* Death, that *David Sinclair*, the younger, presented said Bill to his Father, *David Sinclair*, the elder, and caused him adhibit his Subscription thereto as Drawer.

The various other Deeds, which had been elicited from *James Sinclair* upon Death-bed, made it necessary for *Southdun* to challenge these, by a Process of Reduction and Improbation, and this Bill of 6000 *l.* was included in that Challenge, not only as granted on Death-bed, but upon the several other Grounds above stated, particularly, that it was merely gratuitous, and granted without any valuable Consideration. In answer to which, as it was not then so much as alledged, that it had been granted for any onerous Cause or valuable Consideration, the Defence pleaded was, that there was no Law to hinder a Person, possessed of an opulent Estate, to dispose of his Moveables gratuitously, at what Time he pleased.

Southdun's Title of Action, as Heir of Conquest, being sustained, an Act before Answer was pronounced, and a most distinct Proof was thereupon brought, that all and each of the other Deeds challenged, were granted upon Death-bed, and they were accordingly all reduced, a Circumstance not extremely favourable for the 6000 *l.* Bill. But as that Bill, of whatever Date it shall be supposed to have been, had been taken *remotis arbitris*, of the Hand-writing of *David Sinclair* the younger, though in Name of his Father, *David Sinclair*, the elder, it was impossible to prove by Witnesses, the true Date of that Bill, and therefore it was, that, at a Calling before the Lord Ordinary, in *February 1729*, *Southdun* stated his Reasons of Reduction of said Bill, and exhibited the following Condescendence of Facts, which he offered to prove, by the Oath of *David Sinclair*, the elder, the alledged Drawer of said Bill.

Conde-
scendence.

1st, That he never had any Communing with *James Sinclair*, on or before the 18th *October* 1721, the pretended Date of said Bill, concerning *James Sinclair's* granting a Bill to him for that Sum.

2^{dly}, That he paid no Money, nor gave any valuable Consideration to *James Sinclair* for granting that Bill.

3^{dly}, That said Bill was not signed by him as Drawer, at or before signing the Acceptance, or any Time before *James Sinclair's* Death.

4^{thly}, That said Bill was not delivered to him, and that he did not see or know of said Bill before *James Sinclair's* Death.

5^{thly}, That fundry Words, which then appeared upon the Face of said Bill, were not there, when the Bill was first shewn to him, but that these had been added since *James Sinclair's* Death.

6^{thly}, That it was consistent with his Knowledge, that said Bill was not accepted by the said *James Sinclair*, upon the 18th *October* 1721, and that, when the Bill was first shewn to him, it did not bear the above Date prefixed to it, that the Bill was of the Hand-writing of his Son, the said *David Sinclair*, the younger, and was presented to him by his said Son, after *James Sinclair's* Death, to the end that he might adhibit his Subscription thereto as Drawer.

The Defenders, by their Council, disputed the Relevancy of these Facts, and therefore they refused to take a Day for him to depone, whereupon the Lord Ordinary, by Interlocutor of this Date, "Found the above Facts relevant to be proven by *David Sinclair's* Oath, and, in respect that his Council declined to take a Day for his deponing, or a Commission, held him as confessed thereon, reduced and discerned."—And as here, in the very outsetting, your Lordships perceive *David Sinclair*, without the Colour of a Pretence, declining to take a Day for his deponing, or a Commission

Feb. 4th,
1729.

mission for that Purpose, so, in the after Progress, you will have Occasion to see the various Stratagems and Devices, which were practised to avoid his deposing upon this Reference of Facts, plain and simple, all consistent with his proper Knowledge, unquestionably relevant, the Mean of Proof by his own Oath, and a Commission agreed to.

Against this Interlocutor, a Reclaiming Petition, however, was presented in Name both of *David Sinclair*, the Elder, and *David Sinclair*, the Younger, upon advising of which, with the Answers, your Lordships, by Interlocutor of this Date, ^{Feb. 27th, 1729.} found, that *David Sinclair*, who was Creditor in said Bill, ought to depone as to the Verity of the Date of the Bill, and as to the true Cause thereof, and the Time of signing the same, and the other Articles of the Condescendence, or otherwise held him as confessed, and remitted to the Lord Ordinary on the Bills, in Time of Vacation, to grant Commission, if desired."

It required no small Degree of Invention, to discover any thing in this Interlocutor, to furnish a Pretence for delaying to extract the Act and Commission; but so it was, that the Extract was delayed that whole Vacation, until the 13th *June*, in the next Session, when a Petition was presented, in Name of *David Sinclair*, the Younger, praying an Explanation, whether it was him or his Father, that your Lordships intended should depone, and according as it should be explained, to grant Commission.

A more frivolous Pretence than this, cannot possibly be conceived, the Production of *David Sinclair*, the Younger's, own Brain, calculated for no other earthly Purpose, but to gain so much Time, in the View that, as *David Sinclair*, the Elder, is said to have been then in a valetudinary State of Health, he might, in the mean time, happen to die: For, as all the material Articles referred to Oath, were the proper Facts of *David Sinclair*, the Elder, and which behaved to be consistent with his Knowledge, where could the Doubt be,

C

that

that it was the Father, not the Son, though of the same Name, that your Lordships intended should depone? Was it not then trifling with your Lordships in a most unbecoming Manner, to make the Identity of the Names of Father and Son, the Pretence of delaying the Act and Commission for near the Space of four Months, upon an affected Doubt, whether your Lordships intended the Father or the Son should depone?

June 24th.
1729.

Had your Lordships then refused to grant any longer Time for his deponing, he could with no Reason have complained, but as the Renewal of the Act and Commission, was not opposed upon the Part of *Southam*, in full Confidence, that *David Sinclair*, if brought upon Oath, must confess the whole of these Facts; your Lordships, by Interlocutor of this Date, remitted to the Lord Ordinary to circumduce the Term against the said *David Sinclair*, Elder, with Power to prorogate the Commission formerly granted to the 20th *July*, *but with this Declaration, that if the said David Sinclair should die before deponing, the Circumduction should stand, and he be held as confessed.*

This Declaration, subjoined to your Interlocutor, shows the Sense your Lordships entertained of the Conduct of the said *David Sinclair* younger, and that his whole Scheme and Design was, that his Father, who was an old infirm Man, might die in the mean time.

June 25.
1729.

The Lord Ordinary, by Interlocutor, of this Date, accordingly "circumduced the Term against *David Sinclair* elder, "for not deponing, and held him as confessed, and decern-
"ed; but, in case he should yet be inclined to depone, re-
"newed the Commission formerly granted to him for taking
"his Oath, in Terms of the Act, to be reported on the 20th
"of the Month of *July*: And, in terms of the Lords Inter-
"locutor in Presence, declared, that if the said *David Sin-
"clair* should die before deponing, that the Circumduction
"should stand, and he be held as confessed."

It was impossible, in the direct Way, to shift or postpone this Reference to Oath, any longer. Some other Device, therefore, must be fallen upon, to accomplish that End; and as *David Sinclair* the younger, had taken upon him the chief Conduct and Management of the Defence, as standing nominally in the Right of said Bill, by a pretended *blank* Indorsation from his Father, he preferred a summary Petition and Complaint, in his own Name, to your Lordships, upon the 26th *June* 1729, charging *Southdun* with an alledged Battery committed upon him, *pendente lite*, in which, if he should prevail, the Consequence would be an Absolvitor from the Reduction, during the Dependence of which, the Battery was said to have been committed; and he so far prevailed, that he obtained an Act before Answer, for proving; but, when the Proof came to be advised, it appeared clear to your Lordships, that it was a Squabble of his own Procurement, and in which he was the Aggressor, with a finistrous View to take Advantage of it, in the Way he was then attempting, the Result of which, therefore, was a Judgment of Absolvitor in favour of *Southdun*.

This, however, had so far the desired Effect, that it stopped any further Proceedings in the original Cause, for about eighteen Months, when, at an after Calling, of this Date, *Jan. 13, 1731.* *David Sinclair* the elder, or rather the Son, in his Name, obtained a further Prorogation of the Term, and a Commission for his deponing, to be reported the 15th of *February* thereafter, qualified with the same Condition as in the former Interlocutors.

Your Lordships Interlocutor of the 24th *June* 1729, remitting to the Lord Ordinary to prorogate the Commission, did authorise the Prorogation thereof, only to the 20th *July*, that is for the Space of twenty-six Days; nor was that Space of Time, then complained of, as too short for reporting the Oath. And though the Lord Ordinary, by his Interlocutor, 13th *January* 1731, had prorogated the Time for reporting the

Feb. 24,
1731.

the Oath till the 15th *February*. that is, for the Space of thirty-three Days, Occasion was taken, from thence, to prefer a Representation, complaining, that the Time allowed for reporting the Oath was too short, and which so far prevailed, that the Lord Ordinary, by Interlocutor, of this Date, prorogated the Time for reporting *David Sinclair's* Oath. On the 1st *June* then next, under the same Quality as in the former Interlocutors, in case of his dying in the mean time.

From the foregoing State of Facts and Procedure, it cannot have escaped your Lordships Observation, what Arts and Devices, *David Sinclair* the younger, appears to have practised, to prevent or postpone his Father's being brought upon Oath, and his after Conduct will appear to be of a piece. *David Sinclair*, the elder, died upon the 1st *May* 1731, without deponing, by which the Chequer being closed; and as *Southdun* met with no further Disturbance upon this very extraordinary Claim, he did not extract his Decree of Circumduction, sooner than the 13th *June* 1736.

July 28,
1739.

A Petition was thereupon presented in name of *David Sinclair* the younger, complaining, that the Decree of Circumduction against his Father, had been improperly extracted, in respect that the Execution of the Act and Commission for taking his Father's Oath, had been prevented by *Southdun* himself. For, Evidence of which, there was produced a pretended Warrant by *David Sinclair* the elder, of the following Tenor: " You'll go to *James Budge* of *Toskingall*, and *James Campbell* Sheriff-clerk, who are the Commissioners named " by *Southdun*, my Nephew, for taking my Oath on the " descendance given in by him, anent the Verity of the " 6000 *l.* Bill accepted by my Brother, payable to me, and " indorsed by me to my Son, which *Southdun* raised Reduction of, and require one, or both of them, to come here " without Delay; and this is your Warrant, signed with " my Hand, at *Wasser* the 15th *April* 1731 Years, by me

" DAVID SINCLAIR."

From

From Inspection of this pretended Warrant, of the Tenor above mentioned, the following Observations do obviously occur : 1st, It is directed to no Person whatever. 2^{dly}, It is not holograph of *David Sinclair*, the alledged Granter, nor has it any of the Solemnities required by Law, to render it probative. 3^{dly}, It orders Requisition to be made to one or both of the Commissioners, that they should come to him without Delay, without specifying for what Purpose, further than as this might be implied, from the Reference therein made to the Act and Commission ; but no Mention is therein made, of any Cause or Reason for this peremptory Call. 4^{thly}, It neither authorises nor appoints any Intimation or Requisition to be made to *Southdun* himself. 5^{thly}, And which of all others is most material, it will appear to your Lordships, from ocular Inspection, supposing the Subscription adhibited to this Warrant, to be the genuine Subscription of *David Sinclair* the elder, that he has been prevailed with, to sign his Name upon a Piece of blank Paper, above which this Warrant has afterwards been filled up, and so crowded, that the last Line of the Warrant is intermixed with the Subscription.

And there was also produced an Instrument of Requisition and Protest, dated 17th April 1731, under the Hand of *Benjamin Doull* Notary-publick, said to be taken against *Southdun* personally.

This Instrument did, in Substance, set forth, “ That the
 “ Day preceeding, being the 16th, this Notary, as authorised
 “ by a Mandate from *David Sinclair* the elder, had presented
 “ to the two Commissioners, *James Budge* of *Toftingall*, and
 “ *James Campbell* Sheriff-clerk of *Caithness*, an Act and Commission, granted by the Lords of Session, for taking the
 “ Oath of the said *David Sinclair*, upon the Points thereby
 “ referred ; that both Commissioners had accepted of the
 “ Commission, and said that they would attend any Day for
 “ executing thereof that *Southdun* should name ; that on the

" said 17th, the said Notary-publick, had repaired to the
 " personal Presence of *Southdun*, and, after relating to him
 " what had passed in the preceeding Day's Conference with
 " the two Commissioners, did require *Southdun* to appoint a
 " Day for taking *David Sinclair's* Oath without Delay, be-
 " cause he was then valetudinary, and in a bad State of
 " Health ; that to this *Southdun* made Answer, That the Act
 " could be examined, and *David Sinclair's* Oath taken, up-
 " on any lawful Day of *April* current, or *May* next ; that he
 " could not then instantly condescend upon any particular
 " Day for that Purpose, but that he and the Commissioners
 " would attend upon some lawful Day in *May*, whereof he
 " would acquaint the saids *David Sinclairs*, elder and young-
 " er, some Time before ; that to this *David Sinclair* the
 " younger replied, That, as by the Act it was declared, that,
 " if *David Sinclair* the elder died before deponing, the Cir-
 " cumduction should stand, and as he was in so bad a State
 " of Health, that it was believed by all that saw him, he
 " could not live long, therefore insisted, that *Southdun* might
 " appoint *Monday* or *Tuesday* next for taking his Father's Oath,
 " in terms of the Act ; that *Southdun* still repeating his for-
 " mer Answer, *David Sinclair* younger further represented,
 " That *Southdun's* postponing his Father's Examination
 " might be with a view that he might die before deponing,
 " and therefore protested, that, as *David Sinclair* elder was
 " ready to depone ; and the Commissioners are willing to at-
 " tend to take his Oath any Day that *Southdun* should name,
 " and as *Southdun* nevertheless postpones the naming of any
 " Day, albeit *David Sinclair* the elder is dangerously indis-
 " posed ; in case he shall happen to die before deponing, he
 " may not be held as confessed upon the Articles of the Con-
 " descendence."

This Instrument, which in the Sequel shall be shown to be
 false in all the material Articles, is signed by the Notary
 and two Witnesses, *Alexander* and *John Sutherlands*, as spe-
 cially required thereto, in regard that instrumentary Witnesses

to Protests of this Kind, do not only attest the Subscription of the Notary, but the Truth of the Facts asserted in that Instrument, which therefore requires their personal Presence at the Time, and Knowledge of the Facts which they so attest.

And, upon a general View of the Conduct of both Parties, antecedent to this Time, as your Lordships have seen *Southdun*, from first to last, anxiously pressing to have *David Sinclair's* Oath taken upon the Facts referred to him, from the Difficulty he foresaw there might be in the Proof of some of these Facts, in case of *David Sinclair's* Death; and as, on the other hand, you have seen *David Sinclair* the younger, using all his Address to prevent and postpone his Father's being brought to depone, which had the Effect to delay the same for upwards of two Years, it is humbly submitted, how improbable it is, that *Southdun*, when thus required to appoint a Day for taking *David Sinclair's* Deposition, in respect of his then dangerous State of Health, should have refused the same, thereby to deprive himself of the only Mean of Proof he had been so long struggling for, upon the vain and groundless Expectation that the Circumduction against *David Sinclair*, for not deponing, would be held fast, when he himself was the occasion thereof; or whether, *e contra*, it is not much more presumable, that *David Sinclair* the younger, had afterwards bethought himself of this Stratagem, and cooked up the aforesaid Instrument, to furnish a Handle for the Use that he now makes of it.

For though there is a *talis qualis* Evidence, that *David Sinclair* did, upon the 16th, notify to the Commissioners, at least to one of them, that an Act and Commission, to the above Purpose, was issued, and gave the like Notice to *Southdun*, upon the 17th; it is so far from being true, that he either required the Commissioners to appoint a Day for taking his Father's Oath, or, that they, in answer thereto, referred it to *Southdun* to name the Day, or that *Southdun* was required

to name the Day, and shifted the same in the way and manner set forth; that, on the contrary, it appears, the whole is an absolute Fiction, hatched and devised by young *David Sinclair* and the Notary.

And it is a Circumstance worth noticing, that entirely destroys all Credit to the foresaid Mandate or Instrument of Protest, that they did not make their Appearance till more than five Years after, *viz.* in 1736, when *Doull*, the Notary himself, and one of the Instrumentary Witnesses, were dead, although it was as competent for *David Sinclair* to have brought his Challenge, as well before as after that Period.

Southam put in his Answers to the foresaid Petition, denying all the material Facts set forth in that Instrument, and disputing the Relevancy, supposing all that was alledged to be true.

David Sinclair thereupon intended a Reduction of the above mentioned Decreet of Circumduction, and, after some intermediate Steps, unnecessary to be stated, he obtained a Remit to the Lord Ordinary to hear Parties Procurators as to the Regularity of the Extract of the Circumduction; but as he appeared to be equally backward in pushing on this Process, and rather to keep it alive than to bring it to a Conclusion, *Southam* was obliged to enrol the Cause, when *David Sinclair* not chusing to appear, he suffered Decreet to pass in Absence, finding the Decreet of Circumduction regularly extracted, annulling from the Reduction, and dismissing the Petition, so far as it complained thereof.

Jan. 18th,
1738.

But as this Interlocutor was thereafter laid open, upon a Representation, so, from the 1st of *February* 1733, till the 1750, the Process was allowed to sleep; a Circumstance not extremely favourable, when a Claim for so large a Sum, was, without any visible Cause, abandoned and given up for such a Course of Years, and, there is reason to believe, would have remained in that dormant State to all Eternity, had not *Southam*, who did not chuse to leave a Claim of this kind hanging
over

over his Childrens Head, caused waken the Proceſs; and having obtained a Remit to Lord *Woodhall*, in place of the former Ordinary, the Purſuer was at length pleaſed to exhibit a Condeſcendence of Facts, which he put to *Southdun* to confeſs or deny, though they contained not a Word more than was ſet forth in his Inſtrument of Proteſt.

To theſe *Southdun* made ſpecial Answers, negative as to all the material Points; and, more particularly, he thereby *poſitively denied*, that he either knew or was told of *David Sinclair* the Elder's being in immediate Danger, or that the Notary had, the Day before, applied to the two Commiſſioners to appoint a Day to execute the Act and Commiſſion, or of the alledged Answers made by the Commiſſioners.

Parties differing ſo widely in the State of Facts, the Lord July 19th,
Ordinary, by Interlocutor of this Date, allowed to both Parties 1753.
a Proof of their ſeveral Allegations.

But *David Sinclair*, being ſenſible of the Lameneſs and Imperfection of the Proof of the Averment undertaken by him, although he reported the ſame, yet he did not think it worth his while to get it adviſed, and ſo was ſuppoſed to have dropped his Proceſs altogether. Nor was it ever heard of thereafter, during either his own or *Southdun*'s Lifetimes, nor till of late, that it was taken up and wakened at the Inſtance of the now Purſuer, the Son of the ſaid *David Sinclair*, which is a Circumſtance that deſerves your Lordſhips particular Attention.

The Purſuer, aware of the Force of this Circumſtance, and of the Delays preceeding the Wakening at *Southdun*'s Inſtance, has been pleaſed to alledge, That, after old *David Sinclair*'s Death, his Father was amused by *Southdun* and his Friends, with Hopes of getting this Matter amicably ſettled by a Submiſſion: That the Purſuer's Father being at laſt wearied out, with various Shifts and Pretences of *Southdun* and his Friends, and deſpairing of getting Matters ſettled in an amicable Way, reſolved to inſiſt in, and bring the Proceſs

to, a Conclusion : That *Southdun* being well informed of the Pursuer's Father's Intention, and conscious that it was through *his own Fault* that the Action had been delayed so long, he therefore, if possible, to throw the Appearance of Backwardness upon the Pursuer's Father, resolved to have the first Word ; and, in that view, he execute a Summons of Wakening in *April 1759*, but that, before doing this, he well knew that the Pursuer's Father had given Orders for executing one against him.—And it was further said, That, *soon after* reporting the Proof, the Pursuer's Father died, and that *Southdun's* Relations again proposed a Submission ; but *Southdun* himself likewise dying about this Time, and some of his Representatives, the present Defenders, being Minors, their Relations did not care to take Burden for them in a Submission, which obliged the now Pursuer to insist in this Action.

But all this is entirely affected, and without the smallest Foundation in Truth ; for, after the alledged Battery, there was little Reason to expect an amicable Settlement. Nor does it appear from the Proceedings had in this Cause, subsequent to the Wakening, that the Pursuer's Father ever alledged that such a Measure had even been attempted. The true Reason of the Delay from the 1731, when old *David Sinclair* died, till the 1736, when *David Sinclair* younger brought his Challenge of the Decree of Certification at *Southdun's* Instance, was owing to *Doull* the Notary, and the Instrumentary Witnesses being then on life, from whose Testimony the Measures respecting the alledged Instrument of Protest would have clearly appeared. Nor is there any Evidence that, when *Southdun* raised the Wakening in *April 1757*, the Pursuer's Father had any Intention to awaken the Process, which he had deserted, or that he had given any Orders for that Purpose. It would rather seem, that he was forced, by this Wakening at *Southdun's* Instance, to proceed in the Cause, which he, about three Years hereafter, totally abandoned, without bringing it to an Issue.

The

The Pursuer's Father lived down to the Year 1761, which was after *Southdun's* Death, who died in 1760. So that there neither was, nor could possibly be, any Proposal of a Submission to this Pursuer on the part of *Southdun*, as is alledged; but the present Attempt by the Pursuer is well known to be a desperate Measure, attended with very little Hopes of Success.

It is unnecessary, in this State of the Process, to trouble your Lordships with a Recital of the Lord Ordinary's Interlocutors, which the Pursuer obtained upon a very unfair Representation of the Case, and which were complained of by a Reclaiming Petition on the part of the Defenders, and which, with the Answers thereto made, were thereafter remitted to the Lord Ordinary, and who has now taken the Cause to report.

In the View of which, the Defenders will take the Liberty to examine both the Relevancy and Proof of the Pursuer's Allegations, compared with the contrary Proof adduced upon their part, without at the same time meaning to depart from the Exceptions above mentioned, as relevant to deny any Action upon this Bill, supposing it to be a true Deed, and of the Date it bears.

And, to begin with the Relevancy: Allowing, for Argument's Sake, all that is alledged by the Pursuer to be true; it does not occur to them, how the Consequences grafted thereon will follow. It was *David Sinclair* that was to depone. It was to him the Act and Commission was granted; under a strong Certification in respect of the Indulgence he had already met with, in being reponed against the former Circumduction, *viz.* that, if he failed to depone, and to report his Oath, within the Time limited, the holding him as confessed, already pronounced, should remain in Force. And as the Burden of reporting the Act and Commission lay upon him, it was therefore his proper Business to advert to the regular Execution of the Act and Commission. And, if it could be believed, as set forth in the aforesaid Instrument of Protest, that the two Commissioners, one after another, when applied to appoint a
Day

Day for taking *David Sinclair's* Oath, had, out of Compliment to *Southdun*, left the particular Day to his Nomination, and that *Southdun*, when informed thereof, and of the Necessity that the Examination should be quickly taken, because of *David Sinclair's* Indisposition, had shifted or delayed to name the Day, there was so much the stronger Reason for *David Sinclair's* taking some more effectual Measure to have the Commission executed, and not sitting with his Arms across during the whole Residue of the Time limited. He ought, at any rate, to have reported to the Commissioners *Southdun's* alledged Refusal to fix a Day, and required them to appoint a Diet. That was their Province, not *Southdun's*; so far to the contrary, that, after the Commissioners had appointed the Diet for Examination, Intimation behoved to be made thereof to *Southdun*, who might have attended or not as he had a-mind. Nothing of this kind is so much as alledged to have been done or attempted; and if, by means of this Neglect, the Term for deponing was suffered to elapse, and the Mean of Proof lost by *David Sinclair's* Death, it can scarce be a Question where the Blame lies.

And how is it possible to believe, that, if *David Sinclair* the younger, who had *hitherto* been so intent to postpone or protract his Father's deponing, had *now* become so zealous to have his Oath taken, knowing the Circumduction to stand against him, unless he did depone, that he would have rested satisfied with this supposed Offer from *Southdun*, without acquainting the Commissioners thereof, or applying to them, who, he says, were so extremely willing to take the Examination.

But, allowing this also to pass, let it next be considered what Proof there is of the Pursuer's capital Averments, consisting of the following Particulars: 1st, That *Southdun* was in the Knowledge of *David Sinclair* the Elder's dangerous Indisposition. 2^{dly}, That, upon the Act and Commission's being intimated to the two Commissioners, they agreed to act, but allowed *Southdun* to appoint the Day. 3^{dly}, That this Compliment

ment from the Commissioners, was notified to *Southdun*, and Requisition made to him to appoint a Day, which he refused to do, and put it off, with the frivolous Answer stated in the Instrument of Protest.

If these Facts are not proved, or if any one of them is disproved, the Pursuer's whole Plea must fall to the Ground. That the bare Instrument of Protest, unsupported by the Oaths of the Notary and Witnesses, or other extrinsick Evidence, is no Proof, will scarce be disputed; and as the Pursuer cannot be supposed to have been ignorant of this, his forbearing to move one Step in the Matter, till the Notary and one of the instrumentary Witnesses were dead, is another very suspicious Circumstance, and reduces the whole Proof that has been attempted on the Pursuer's part, within a very narrow Compass.

It is known to your Lordships, by repeated Experience, what Liberties are taken in those remote Parts by Messengers and Notaries, in procuring Witnesses to adhibit their Subscriptions to their Executions or Instruments of Protest, when they were not present at the Place or Time when these Things are said to be done, and know no more of the Matter than the Child that is unborn.

A stronger Instance of this cannot be figured than what occurs in the present Case, as it comes out on the Testimony of *John Sutherland*, the only instrumentary Witness alive, and the more to be credited, that, however ignorantly he may have been drawn into this Scrape, trusting to the superior Skill of the Notary, he is confessing Guilt against himself, for which his Ignorance of the Law would be no Protection.

This Witness being shown the Instrument of Protest, fairly acknowledged its being his Subscription, but at the same Time confessed, " That he did not hear *one Word* of what was therein contained read, nor did he read it himself, to the best of his Knowledge; that he does not remember at what Time or Place he did subscribe it, or whether before or after *David Sinclair* the elder's Death; and depones, that

F

" he

" he neither saw the Pursuer take an Instrument in the Notary's Hands against *Southdun*, nor did he hear what they said, as he was then standing at the Gavel of *Southdun's* Kitchen, a considerable Distance from where they were." And further adds, " That he signed that Instrument at *Benjamin Doull's* Desire, but did not know what it contained." If this Witness is to be credited, and the Pursuer surely will not dispute the Credibility of his own Witness, he is so far from attesting the Instrument, that he proves it to be a forged Deed, in fabricating of which, very undue Practices seem to have been used.

Thomas Bremner, the Notary's Servant, but who was not proper to be an instrumentary Witness, because he could not write, gives an Account of a Meeting between the Pursuer, *Southdun*, and the Notary, on a Ley-field below *Southdun's* House, and in so far seems to concur with the former Witness, and depones, " That he saw the Pursuer have a Paper in his Hand, about the Bigness of the present Act and Commission," (well remembered at the Distance of thirty-four or thirty-five Years) " and, to the best of his Remembrance, thinks it was about taking the Pursuer's Father's Oath, that he saw the Pursuer take Instruments in his Matter, the Notary's Hands, and required *John Sutherland* (the former Witness) and another *Sutherland*, whom he does not know, to be Witnesses at taking the Instrument."

What this Witness has deposed, in the above Particulars, is flatly contradicted by *John Sutherland*, the instrumentary Witness, who swears positively, " that he was neither desired by the Pursuer or Notary to be a Witness to the taking the Instrument taken, nor was he so near as to hear what passed between them."

The same Witness (*i. e.* the Notary's Servant) proceeds to give Account of his going with the Pursuer and his Master, the Notary, to the House of the two Commissioners, and " saw that Paper, which his Master presented to *Southdun*, in his Master's Hands, and believes the Business was to inti-

" make

“ mate that Paper to the Commissioners ; but as he had not
 “ Access to go up Stairs in the Gentlemens Houses, he did
 “ not see that Paper intimated to them, but heard it was in-
 “ timated.” This Part of the Oath is a Curiosity ; if the In-
 strument itself is to be credited, the Act was intimated to
 the Commissioners upon the 16th, and to *Southdun* upon the
 17th, referring to the alledged Conference with the Commis-
 sioners, the preceding Day ; but this Witness, ignorant and
 illiterate as he appears, swearing to a Fact more than thirty
 Years old, makes the Visit to the Commissioners to have
 been *posterior* to the Visit to *Southdun*, and judges it to
 have been the Act and Commission shown to him at depo-
 ning, because it was much of the same Size, but as he
 was not allowed to go up to the Commissioners in their
 private Apartments, he knows nothing of what passed in
 private.

But the Matter does not rest upon the Evidence of these
 two Witnesses ; for you have the Oath of *James Campbell*,
 one of the Commissioners, who depones, that he does not
 remember of the Act and Commission's being intimated to
 him, nor any thing about said Act and Commission. Nor
 can this be deemed a mere *non memini* ; for, if any such Act
 and Commission had been presented to him, and he required
 to appoint a Day for executing the same, which he had shifted
 or declined, it is scarce to be imagined, that so material a
 Circumstance, in that Part of the Country, would have pass-
 ed without Observation ; so that it is at least as strong a *non*
memini as can well be supposed.

James Budge of *Toftingall*, the other Commissioner, goes
 so much further as to say, that the Pursuer and Notary
 came to his House, and intimated to him the Act and
 Commission ; that he neither remembers of his being required
 to appoint a short Day for executing the same, because of the
 Pursuer's Father's Indisposition ; that he told the Notary, that
 he was ready to examine when *Southdun* called him ; but that
 he was willing to accept and examine the Commission in
 Terms of the Act.

This

This is the whole of the Proof respecting this Article ; and, when the whole Case is taken under Consideration in one complex View, the Defenders flatter themselves, that your Lordships will be satisfied of the Insufficiency and Falsity thereof in every Article ; particularly of the Requisition said to have been made, both to the Commissioners and *Southdun*, to have a short Day fixed for executing the Act, in respect of *David Sinclair's* Indisposition, and the Answers they are severally said to have made thereto.

The abandoning of it for so many Years, till *Southdun* awakened it, shows what Opinion *David Sinclair* had of it. It would not hurt the Cause, were the Petitioners to admit, that the Act and Commission had been notified both to *Southdun* and the Commissioners, unless it had also been proven, that they were both *required* to take *David Sinclair's* Oath, and *refused* to comply ; but nothing of this is so much as alledged, so far as regards the Commissioners, and it is disproved, so far as regards *Southdun*, as the *one* would not be true, if the *other* was false.

The Pursuer is pleased to lay Stress upon the Mandate before mentioned, alledged to have been given by the Father to make this Requisition : but this is plainly of a piece with the rest of the Cookery of *David Sinclair* the Son : He behaved to be possessed of the same Materials for making this fictitious Requisition, as if it had been a real one ; and, in this View, he prevails with his Father to sign a blank Paper for filling up a Mandate, to be used or not as Occasion should afterwards require, and he proceeds so far as to notify, that he had such an Act and Commission ; but, that he made such Requisition as has been alledged, is not only not proved but disproved, though this is the Hinge of the whole. And therefore, though the Defenders cannot admit that any such Requisition was made, or Answer given, they greatly doubt whether it would be relevant, as it was the Province of the Commissioners *alone* to appoint a Day ; so that upon *Southdun's* alledged refusing to appoint a Day, they ought forthwith to have resorted to the Commissioners, who, it cannot be doubted, would

would most readily have named a peremptor Day for the Examination, in which there could have been no Difficulty; as the Condescendence of Facts upon which *David Sinclair*, elder, was appointed to be examined, was fully engrossed in the Act and Commission. It is therefore inconceivable that *David Sinclair* the younger, would have neglected this, when he saw his Father just a-dying, (which, by the bye, is a Circumstance that appears to have been carefully concealed from *Southdun*) if he had not judged it more for their Interest, that Matters should remain as they were.

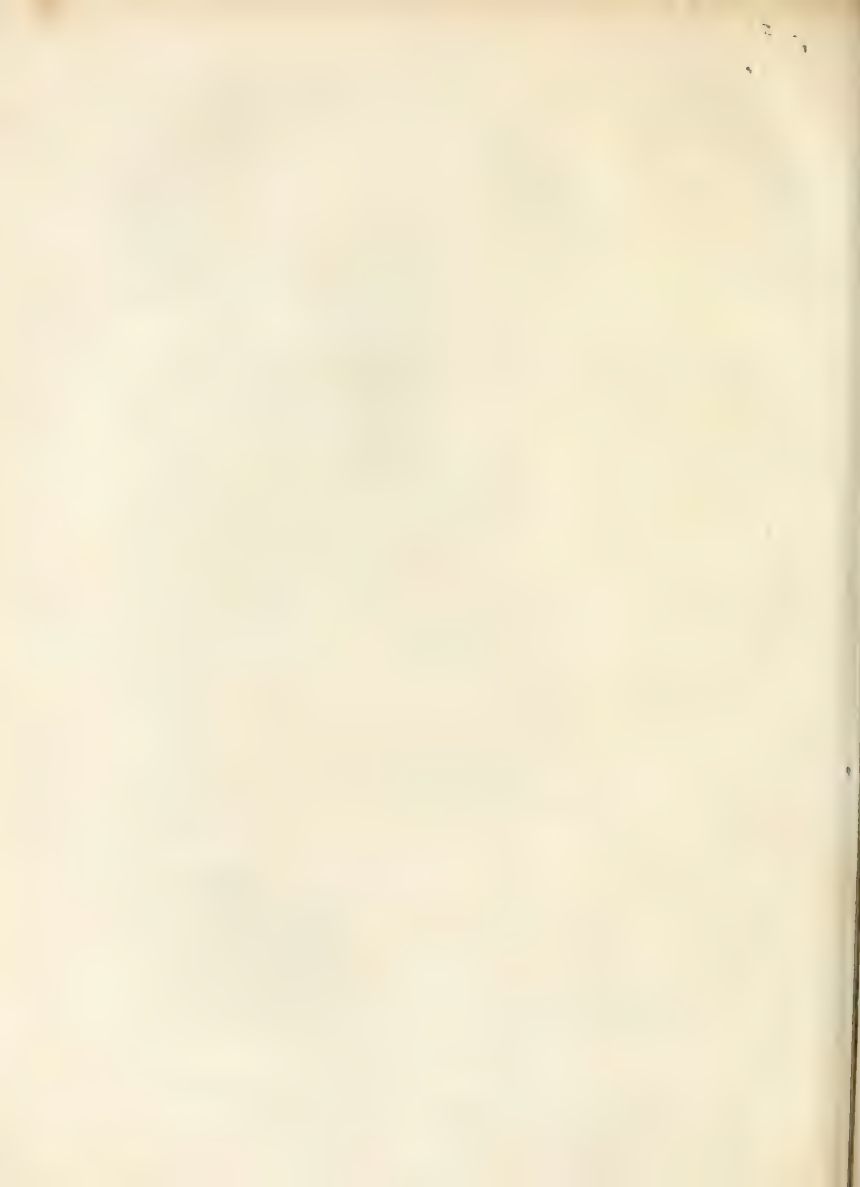
And therefore to conclude, as this is a very heavy Claim that is now brought against the Defenders, founded upon a Bill of so old a Date, that the Interest is swelled to more than double the principal Sum, labouring at the same Time under such suspicious Circumstances, as must give the strongest Conviction of its not being a true Debt; and, as the Facts referred to *David Sinclair's* Oath were unquestionably relevant to cut down the same, that he was rightly held as confessed for refusing to depone; and thereafter reponed against that Circumduction, under the express Condition, that, if he died before deponing, the Circumduction should stand; that he accordingly did die before deponing, merely by his own Fault or Neglect, to say no worse, after such a Train of Devices to protract the deponing, could no longer be available; and as the Defenders are, by means thereof, deprived of several Witnesses, who could have proved many of the Facts contained in *Southdun's* Condescendence, they are, in your Lordships Judgment, whether this Pursuer has any Claim, either in Law or Justice, to be reponed against that Circumduction.

And, supposing your Lordships were now disposed to restore this Pursuer, at such a Distance of Time, when all other Mean of Proof is lost, against the aforesaid Circumduction and Holding, as confess, it is humbly thought, the other Exceptions to this Bill, as a probative and effectual Instruction of Debt, are so strong, that Action could not be sustained thereupon, against the Representatives of *James Sinclair*.

In respect whereof, &c.

ALEX. LOCKHART.

The Lord spoiled the Deff.



h^o 7th MARCH 9, 1768.

Unto the Right Honourable the Lords of Council and Session,

THE
P E T I T I O N
O F

JAMES FEA of *Clesteran*,

Humbly sheweth,

THAT in the 1649, *Patrick Smith* younger of *Braco*, with Consent of *Patrick Smith* of *Braco*, his Father, disposed to *Alexander Smith* of his Heirs and Assignees, an annual Rent of 320 Merks, to be uplifted out of the 18 Penny Land of *North-Strenzie*, and others, in the Island of *Stronsfey* in *Orkney*, reserving to the said *Patrick Smith*, elder, his Liferent, and to be enjoyed after his Death by the said *Alexander Smith*, and his forefairs, till Redemption should be made, conform to a Clause of Reversion, in these Words, “ Likeas it is specially provided, be express Condition hereof, that at what Time, or how soon it shall happen me, the said *Patrick Smith* younger, or my said Father, or otherways, *John Smith* my Brother, eldest lawful Son to my said Father, Assignee constitute be us, or his Heirs, upon any Day betwixt the Sun rising, and down passing thereof, within the Kirk called *St. Magnus Kirk* in *Kirkwall*, at any Place above the Greess thereof, convenient for numbering of Money,

“ney, thankfully to content, pay, and deliver, to the said
 “*Alexander Smith*, his Heirs, or Assignees, all and hail the
 “Sum of 4000 Merks *Scots*, having Course for the Time, to-
 “gether in one Sum; the said *Alexander* and his forefairs,
 “being lawfully warned to the Effect thereof, personally,
 “or at their respective Dwelling-places, in Presence of an
 “Notar and Witnesses, as effairs, upon the Premonition of
 “40 Days, preceeding whatsomever Term of *Whitsunday* or
 “*Martinmas*; then, and in that Case, the said *Alexander* and
 “his forefairs are, and shall be restricted to grant, all and
 “hail the said annual Rent and Lands above specified, out
 “of which the same is annalized, to be lawfully redeemed
 “and out-quit frae them, and shall renounce the same, to-
 “gether with thir Presents, and Infeiment to follow there-
 “upon, with all other Right, &c.” or in Case of Absence
 or Refusal, it is thereby appointed, that Consignation shall
 be made of the principal Sum, and any Annualrents due
 thereupon, in the Hands of one of the Baillies of *Kirkcaldy*
 responsal for the Time. Upon this Disposition, Infeiment
 followed in *October 1649*, and Mr. *Smith*, or his Successor,
 likewise entered to Possession of the Lands, the Wadset
 Sum being thought more than equivalent to the Value
 thereof.

Sept. 7,
1675. The said *Alexander Smith* in 1675, disposed the said heri-
 table Right to *George Scott* of *Gibbippen*, and in the 1683,
 April 2,
1683. the said *George Scott* disposed the Premises to *Patrick Fca* of
Whitchall, the Petitioner's Grandfather.

November
1702. In the Contract of Marriage of *James Fca*, eldest Son of the
 said *Patrick Fca*, *Patrick*, the Father, disposed the said Lands
 to his Son *James*, and upon this Contract, as well as upon
 the Conveyances above mentioned, Infeiments followed.

Feb. 25,
1723. In the 1725, *Robert Robertson* of *Tillicoultry* led an Adjudi-
 cation of the Lands above mentioned, and many others, a-
 gainst *Hugh Smith* Writer in *Edinburgh*, as charged to enter
 their in special to the deceased *Hugh Smith* of *Huip*, his Fa-
 ther,

ther, *Patrick Smith* his Uncle, *John Smith* of *Huip*, his Grandfather, and *Andrew Smith* of *Rotherholm*, his Grand-uncle, or to one or other of them who died last vest and sealed in the Lands and others therein mentioned.

Under the Title of this Adjudication, *Robertson* of *Tilliebel-ton*, in the 1726, brought a Process of Reduction and Improbation against the Petitioner's Father, and many other Defenders, calling for Production in general of all Bonds, Obligations, Contracts, Dispositions, Wadsets, &c. affecting the Lands adjudged, and concluding to have the same reduced and improved upon the common Reasons, and likewise to have it declared, that the Pursuer had the preferable Title to the said Lands, in virtue of his Adjudication, and that any Right thereon in the Persons of the Defenders, were extinguished by their Intromissions with the Rents, and that the Defenders in general should be ordained to count and reckon for their said Intromissions.

It is unnecessary for the Petitioner to trouble your Lordships with a Detail of the various Proceedings in this Process, against the different Defenders, it is sufficient to observe, that *Whitehall*, the Petitioner's Father, contended that the foresaid Disposition 1649, was of the Nature of a proper Wadset, and therefore, that he was not accountable for the surplus Rents, beyond the legal Interest of the Wadset-sum. But the Lords, on the 19th July 1727, "found that the Rents " or Payments over the legal Interest, must impute *in sortem*, " since the Time the Interest fell due."

In the Year 1731, a Proof was allowed to the Pursuer, of the Time of the Defender *Whitehall*, and his Author's entering into Possession of the Lands, and of the yearly Rent thereof, and to the Defender, of the Deductions from the said Rents, by Payment of Cess, Tiend, Feu-duties, &c.

A Proof was accordingly taken, and thereafter the Process was dropt, and allowed to lie over for many Years. The Reason of this plainly was, that there did not appear from the

the Proof any ground to expect, that the Wadset-sum would be found to be impinged or diminished by the Possession of the Defender or his Authors. The Lands had been set in Steel-bow, and continue so to this Day, and the Steel-bow Goods are the Property of the Wadsetter; besides, independent of these Goods, which fell to be restored to the Wadsetter in the Event of a Redemption, it even then was considered, that the Wadset-sum alone was fully equal to the Value of the Lands.

But although, for these Reasons, the Pursuer for many Years deserted the Process of Improbation, and the Defender thought it had been entirely dropt, yet some Years ago it was again revived, and wakened, and transferred against the Petitioner, at the Instance of *Jean Smith*, said to be Daughter of the above mentioned *Hugh Smith* Writer in *Edinburgh*, and *Alexander Mercer* her Husband, for his Interest, as pretending to have Right to the foresaid Adjudication, at *Robertson* of *Tilliebelton*'s Instance, and the Lord *Almoner* Ordinary remitted to Mr. *Francis Farquharson* Accountant, to consider the Proof and to report. Mr. *Farquharson* accordingly made his Report, and the Objections thereto were adjusted by Lord *Almoner* in 1764.

After this, the Pursuer again allowed the Cause to sleep till the 1767, when it was wakened of-new, and another Remit made to *Alexander Farquharson* Accountant, to make out another Account, agreeable to the former Interlocutor. This was accordingly done, and the last Report was lately approved of by the Lord *Gardenston* Ordinary, to whom the Cause had been remitted, in place of Lord *Almoner*. This last Report fully verified what the Petitioner has mentioned above, respecting the Possession of the Lands, for it from thence appears, that the Interest of the Wadset sum, exceeded the Intromissions of the Petitioner, and his Predecessors, and Authors, with the free Proceeds of the Rents of the Lands down to *Whitsunday* last, 1767, in 95 *l.* 6 *s.* 11 *d.* Scots, so that this

Balance

Balance of Interest was then due to the Petitioner, over and above the entire Wadset-sum of 4000 Merks, and the Steelbow Goods, or Value thereof.

The Petitioner apprehended, that the Procefs of Improbation, was here at an end, as it was thus clearly proved, that no Challenge lay against the Wadset-right, and that the same was still subsisting in full Force, and as effectual as when granted, and so could not be set aside, otherways than by a regular Redemption, in terms of the original Contract or Disposition ; but very unexpectedly to the Petitioner, the Pursuers at a calling upon the 10th of *February* last, insisted, that upon their making Payment to the Petitioner at the Term of *Whitsunday* next 1768, of the said principal Sum of 4000 Merks, with 87 l. 1 s. 8 d. Scots of Interest then due ; or in Case of his Refusal, consigning the same in the Hands of any responsal Person, within the Burgh of *Kirkwall*, the Lands should be found and declared to be lawfully redeemed. To this Proposal the first Objection that occurred was, that the Pursuers were not now insisting in a Declarator of Redemption, but only in a Reduction and Improbation, in which there neither was libelled nor could consistently be so, any declaratory Conclusion for Redemption upon Payment, and therefore, that as the Wadset-sum was now proved to be entire, and the Right itself good and effectual, the Petitioner fell to be assoilzied from this Improbation, reserving to the Pursuers (if intitled) to follow out the Redemption ; agreeable to the Wadset-right.

The Lord *Gardenston*, Ordinary, was nevertheless pleased, at the said Calling, to pronounce the following Interlocutor: *Repels the above Objection, and finds, that, upon the Pursuer's making Payment to the Defender, at the Term of Whitsunday next, of the principal Sum of 4000 Merks, and 87 l. 1 s. 8 d. Scots of Interest then due thereon ; or, in case of the Defender's refusing Payment, by consigning the said Sums in the Hands of any responsal Person within the Burgh of Kirkwall, upon the Peril*

of the Confuser : then finds the Lands contained in the Defender's Wadjet-right lawfully redeemed, and reduces, improves, decorns, and declares accordingly.

Against this Interlocutor the Petitioner offered a very full Representation, which the Lord Ordinary was pleased, on the 25th February last, to *refuse*, without Answers ; and as the Days of Reclaiming will expire about the End of the Session, and his Lordship has appointed the Redemption to take place before the next Session, the Petitioner finds himself under the Necessity of making this Application, for a Review and Alteration of the above Interlocutor, which, considering the Multiplicity of other Business, he would not otherways have inclined to have troubled your Lordships with at present.

In the *first place*, then, your Lordships have already heard, that the sole Title upon which the present Process of Improbation was commenced, is the Adjudication at *Robertson* of *Tullibarton's* Instance, against *Hugh Smith*, as charged to enter Heir to his Predecessors. This Adjudication, while in *Robertson's* Person, as it was led (in Absence of the Petitioner's Predecessor) against the Wadjet-lands, as well as others, might perhaps be a sufficient Title in an Improbation, to force Production of the Petitioner's Rights, and to bring on a Competition between them and the Pursuers. But such Adjudication could not be a sufficient Title in a declaratory Action of Redemption of the Petitioner's Right (which clearly excluded that of the Pursuer's even supposing the present Action were of that Nature. In order to entitle any Person to redeem the Wadjet, such Person must have a clear Right to the Reversion.

The above Adjudication proceeds on a Charge given to *Hugh Smith* to enter Heir to a Number of Persons of the same Name, who are said to have been his Father and Grandfather, Uncle and Granduncle ; but there is no Evidence whatever, that these Persons stood in that Degree of Relation to him, or that any one of them was *Smith* of *Braco*, the Granter

Granter of the Wadset-right, or that either he or they were Heirs to the *Smiths* of *Braco*, or had otherways any Right whatever to the Reversion of the Lands.

2do, Supposing that *Tillibelton's* Adjudication could have been a sufficient Title for his redeeming the Lands, yet the present Pursuer, *Jean Smith*, and her Husband, have hitherto produced no Right whatever to that Adjudication, which, for ought appears, does still belong to *Tillibelton*, or his Heirs; and, without either a Back-bond or Conveyance, this Pursuer, supposing her to be truly the Heir of *Hugh Smith*, against whom the Adjudication was led, could not have any Right thereto, or Title to redeem the Wadset, in pursuance thereof. The Petitioner likewise apprehends, that he has a clear Interest to oppose his being obliged to renounce the Wadset, in favours of any Person whose Title is defective and uncertain, not only in regard that he is to be thereby deprived of the Possession of Lands which he and his Predecessors have enjoyed for above a hundred Years past, but because, were he to renounce in favour of an improper Person, he might afterwards be troubled and disquieted, at the Instance of some other Person having a good Right to the Reversion.

3tio, By the original Wadset-right, it is provided, that the Wadsetter shall hold the Lands *Blanch* of the Reverser and his Heirs; and accordingly a base Infestment was exped upon the Wadset-right. Now, it is certainly understood, that, in the Event of a legal Redemption, the Petitioner should be obliged to renounce the Wadset-right in favour of the Reverser. But your Lordships will observe, that the Petitioner neither is, nor could be *in titulo* to renounce the Wadset, as he never could obtain a Precept of *clare-confat*, in order to his expeding an Infestment. Neither is the Pursuer *in titulo* to grant any such a Precept, seeing neither she, nor her supposed Authors or Predecessors, ever were infest in the Wadset-lands, and, consequently, could not, with any Propriety, pursue

pursue against the Petitioner a Declarator of Redemption of this Wadset.

4^{to}, Supposing the Pursuer had a sufficient Title in her Person to redeem this Wadset, yet the present Process is not a *Declarator of Redemption*, but, on the contrary, a Process of *Improbation and Reduction*, which is quite the Reverse of such a Declarator. The Conclusions of the present Process are, 1^{mo}, To have the Defender's Rights improved, as being false and forged. And, 2^{do}, should the Pursuer fail in the first Conclusion, to have it declared, that the Pursuer's Right is preferable to that of the Defender's; or, at least, that the Defender's Rights are extinguished by their Intromissions with the Rents: Instead of admitting, as in a Declarator of Redemption, that the Wadset was a subsisting and effectual Right, and concluding that the Pursuer was entitled to redeem the same, by Payment of the whole, or any Part of the Wadset-sum, the Pursuer has till now strenuously insisted, that the said Right was either null *ab initio*, or that, at least, it was totally extinguished by Possession. Upon these Allegations Issue was joined, and Acts of Litiscontestation extracted, above twenty Years ago; and as it has now appeared from the Proof and Judgments in the Cause, that the said Plea of the Pursuer was destitute of any Foundation, the natural Consequence thereof is, that the Petitioner ought to be absolved from this Improbation, and also found entitled to the great Expence he has been unnecessarily put to by this groundless Process, commenced in the 1726, reserving to the Pursuer, if truly in the Right of Reversion, to follow out the Redemption as accords.

5^{to}, The Lord Ordinary's Interlocutor, finding the Lands to be redeemed upon Payment or Consignation made at *Whitsunday* next, as therein directed, and thereupon "re-
" ducing, improving, decerning and declaring accordingly," plainly supposes these two things: 1st, That the *improving* and *redeeming* this Wadset are consistent. And, 2^{do}, that there

there is such a Conclusion in the Pursuer's Libel as can found a Declarator of Redemption. Now, with great Submission, both these Points stand quite the other Way. It is impossible to reduce and improve the Petitioner's Right, when it has already been found that it is a good and subsisting Wadset, and the redeeming it clearly supposes it to be so; so that it cannot be at the same Time improved and redeemed. Neither is there any Conclusion whatever in the Pursuer's Libel that can found a Declarator of Redemption, but rather the Reverse, as already observed. And, were the Pursuer inclined to make an Amendment of the Libel to that Effect, which has never yet been proposed, the Petitioner apprehends it could not be competently done; both because such a Conclusion would be contradictory to the whole Strain of the Libel, which tends to have the Wadset improved or reduced *in totum*, and because the making such an Addition is not admissible after Acts of Litiscontestation, and Proofs being taken and advised upon a quite contrary *Medium*.

Thus, a Defender having proponed peremptory Defences, which would have subjected him to the passive Titles, if libelled, but no passive Title being libelled, save that of lawfully charged to enter Heir, and no Charge being produced, the Lords refused to allow the Pursuer to amend his Libel, by inserting the other passive Titles, in order to conclude the Defender as to these also, *Forbes*, 13th December 1709, *Earl Lauderdale contra Lord Yester*. And, in another Case, observed by the same Collector, 3d July, 1712, *Colquhoun contra the Laird of Newmains*, the Pursuer was not allowed to eik a new Conclusion to his Summons, after an extracted Act, although in those Cases the Amendment proposed was not inconsistent with the other Branches of the Libel, as it would be in the present Case.

6to, Reversions are held by all our Lawyers to be *stricti juris*, so that the Terms of Redemption expressed in the

C.

Right

Lib. 2.
Dig. 6.
§ 3.

Book 2.
Tit. 10,
§ 18.

Right must be observed.—Sir Thomas Craig's Words are: *In summa, hoc semper in reversione servandum, ut ejus verba, sine tenor inspiciatur, tanquam in investituris, et ut secundum ea denunciatio et obsignatio fiant.* Lord Stair likewise lays it down as an established Rule. "That Wadsets must be "redeemed according to the Reversion, in *forma specifica*, "and not *per equipollens*." And many Decisions, proceeding on this Ground, are to be found in the Dictionary, Title, *Redemption*. Your Lordships are always particularly attentive to the Security of Land-rights; and indeed too much Care cannot be taken to prevent their being shaken or thrown loose. And although, in later Times, it has been thought proper, from equitable Considerations, to give some Relaxation for the rigorous Observance of the ancient Rules as to the Redemption of Lands, particularly sustaining Processes of Declarator of Redemption for supplying the Place of Premonitions, yet the Petitioner can discover no Instance, in the Practice of this Court, where a Wadset has been declared to be redeemed, not only without following out the Order of Redemption, but without any Summons of Declarator being brought, or so much as a Conclusion in a Libel to that Effect.

The Petitioner cannot find, that, in any late Case, your Lordships have gone further than sometimes to allow a regular Declarator to precede the Redemption, so as to supply the Place of the Premonition, and to have all the preliminary Questions therein adjusted, that might otherways afford a Ground for challenging the Order of Redemption when used, or for impeding its taking place; and, in some Instances, where the Order prescribed by the Deed has been actually used, but afterwards excepted to, your Lordships have allowed the Defect to be supplied by Payment or Consignation of the Money, in a Manner equally convenient for both Parties.

Thus,

Thus, in the Case of the Duke of *Gordon* contra *Macpherson*, 2d March 1756, the Redemption being competent upon any *Whitsunday*, the Duke, at *Whitsunday* 1755, executed a regular Premonition, and Order of Redemption, and thereupon brought his Declarator; but *Macpherson* objected, that, by the Clause of Reversion, the Money should have been paid in Gold and Silver, whereas the Duke had consigned Bank-notes; and your Lordships only sustained the Order of Redemption to this Effect, "That the Duke might redeem the Lands, by Payment or Confignation, upon the Term of *Whitsunday* then next 1756, of 4000 Merks, in one Sum of current Gold and Silver, having Passage for the Time, and, upon the Pursuer's making such Payment or Confignation, found the Lands redeemed, from and after the said Term." There your Lordships would not even suffer Notes to be substituted in place of Gold and Silver, mentioned in the Wadset-right, and only sustained the Order of Redemption that had been used, and the Process of Declarator thereupon, as sufficient to answer for a Premonition to the Wadsetter, that the like Order of Redemption was again to be used at the next *Whitsunday*, in the exact Manner prescribed by the Contract.

Again, in a still later Case, determined in *February* 1762, between *Campbell* of *Glenure*, and others, Adjudgers of the Estate of *Appin*, and the *Stewarts* of *Ballochellish*, who had two Wadsets upon the Estate, whereof the Redemption was limited to twelve Years, which expired at *Whitsunday* 1761, a Ranking of the Creditors of *Appin*, and likewise an Improbation having been brought, the *Stewarts* were thereby obliged to produce their Wadset-rights, and the Adjudgers thereby discovered the Limitation of the Reversion; but the Adjudgers did not pretend, as the present Pursuer is doing, to convert their Improbation into a Declarator of Redemption; on the contrary, the Pursuer of the Sale, and Mr. *Campbell* of *Glenure*, another Adjudger, did, in due Time, before

fore *Whitsunday* 1761, raise a proper Summons of Declarator of Redemption against the Wadsetters, for having it found that they were intitled to redeem the Lands, and that an Order at the Bar of the Wadset-money, or Confignation thereof, should be an effectual Redemption. This Declarator was called so early as *February* 1761, but the Pursuers were advised not to trust to its Effect with regard to the dispensing with the Form of Redemption, and therefore *Glenure* made a formal Premonition, and thereafter, upon the Term-day, used the precise Order of Redemption directed by the Wadset-rights. The Pursuers afterwards insisted in their Declarator, and the Wadsetters having still struggled the Redemption, notwithstanding all that had been done, your Lordships justly found the Lands redeemable, and, upon the Pursuers making Payment of the respective Wadset-sums to the Defendants against the Term of *Whitsunday* 1762, declared the Lands redeemed.

In this last Case, your Lordships will likewise observe, that the Order of Redemption was not dispensed with, but only the Term for Payment of the Money prorogated, so as to prevent the Equity of Redemption from being foreclosed, in respect of the Wadsetters having refused to take the Money at the Term appointed by the Right, notwithstanding that the Pursuers had done every thing in their Power for obliging them to accept of it.

But the Interlocutor now complained of goes far beyond what was done in either of these Cases, for, without any Declarator, or Conclusion of Declarator, it entirely abolishes the Order of Redemption prescribed by the Wadset-right, and, in place thereof, substitutes another Form, by Payment of the Money to the Petitioner, or Confignation thereof at *Whitsunday* next, in the Hands of any responfible Person within the Town of *Arkwall*; and, upon this new Order being used, declares the Lands to be redeemed, and the Wadset reduced, or at an end. The Petitioner, however, cannot think your

Lordships

Lordships will incline to abolish in this Way the Form of Redemption, settled by the express Contract and Agreement of Parties, especially in a Case where there can be no Necessity for doing it, as the Reversion is not here limited to the Term of *Whitsunday* next, but may take effect at any subsequent *Whitsunday*; and where the Pursuer, or her Authors themselves, have already postponed the Redemption for upwards of thirty Years past, by a groundless Litigation, respecting the very Subsistence of the Petitioner's Right.

And, *lastly*, As the Wadset-sum was held equivalent to the Value of the Lands, and as, after the Proof was taken in the Improbation, the Pursuer deserted that Process for a great Number of Years, and seemed to have entirely dropt it, as untenable; the Petitioner was in the Belief of his still holding the Lands as his Property, and being about to go abroad, he granted a Tack of the Lands, whereof a few Years are yet to run. This is well known to the Pursuer; and as the Petitioner is bound to allow the Reverser the same Rent, if not more than that Tenant pays him, he can only impute the present Attempt for dispossessing him summarily, to the Pursuers having a Design of challenging that Tack, and thereby involving him in a Question of Damages, with the Tenant upon the Warrandice of it.

On the other hand, so far has the Petitioner been from desiring to take any unreasonable Advantage of this Wadset-right, that he has repeatedly made this Offer to the Pursuer, even judicially, that, providing the Pursuer would make up her Titles, and take the said Tack off his Hand, paying him, at the same time, for the Steel-bow Goods on the Lands, or finding Security, to deliver them up to him at the Expiration of the Lease, he would accept of the Wadset-sum, with the Interest due thereon at *Whitsunday* next, and both renounce the Wadset, and assign the said Tack to the Pursuer. As this most reasonable Offer has been repeatedly rejected by the Pursuer, it is from thence plain, that the Pursuer in-

D.

tends.

tends to involve him in Trouble and Distress, by pushing this Redemption so precipitately after the Conclusion of the Improbation, or Reduction of the Right against her, and, consequently, every Defence competent to him must now appear in the most favourable Light. The Petitioner therefore submits it to your Lordships, that, in any Event, the Pursuer and her Husband ought to re-imburse him in the Expence they have put him to, in defending against a groundless Challenge of his Right, before they are permitted to redeem it from him, upon the Footing of its being a good and subsisting one.

May it therefore please your Lordships, to alter the Lord Ordinary's Interlocutors above recited; and, in respect it is now found, that no Part of the Wadjet-sum has been satisfied or extinguished, by Intromissions with the Rents of the Wadjet-lands, to assist the Petitioner from this Process of Reduction and Improbation, and to find the Pursuer and her Husband liable to the Petitioner in the Expences incurred by him and his Father, in their Defence against the same, reserving to the Pursuer, upon making up Titles to the Reversion, to follow out the Redemption of the Lands, agreeable to the Wadjet-right.

According to Justice, &c.

D A V. R A E

A N S W E R S

F O R

ALEXANDER MERCER Merchant in *Edinburgh*, for himself, and as Administrator in Law to *William, John, Hew, Alexander, Janet*, and *Jean Mercers*, his Children by his deceased Wife *Jean Smith*, Daughter of *Hew Smith* Writer in *Edinburgh*, also deceased.

T O T H E

P E T I T I O N of JAMES FEA of *Clesteran*.

IN the year 1649, Patrick Smith of Braco having settled his land-estate in Orkney upon his eldest son Patrick Smith, he did at the same time make sundry provisions in favour of his younger children, of whom he had no less than thirty, who all lived to be men and women.

Of this date, the said Patrick Smiths elder and younger, joined in a deed, whereby, on a recital that Patrick Smith elder had uplifted the sums of money destined for provisions to his younger children, and had purchased therewith certain lands in the shire of Perth, which would fall to his eldest son, and being willing that the other children should be sufficiently provided; therefore they disposed to John Smith the eldest son of the second marriage, the lands of North Strynie, and others lying within the island of Stronzie. This deed contains absolute war-randice, with a reservation therefrom, of a right of annualrent out of
A these

April 28.
1549.

these lands, granted by them to Alexander Smith another younger son, to the reversion of which the said John Smith is thereby particularly assigned. Upon this disposition, and a charter which was granted apart, of the same date, agreeably to the practice of those days, the said John Smith was infeft bafe, and his sasine duly recorded in the same year.

The right of annualrent referred to in this deed, was intended as a security to the said Alexander Smith, for his portion of 4000 merks, and was constituted by a disposition of the same date, executed by the said Patrick Smiths, elder and younger, whereby, on the same narrative with the deed in favour of John, they disposed to the said Alexander Smith, his heirs, and assignees, an annualrent of 320 merks Scots, which was precisely the interest at eight *per cent.* which then took place, of 4000 merks, to be uplifted forth of the said lands of North Stryme, and others disposed to John as above-mentioned. This annualrent is by the deed declared to be redeemable *at any time* by the said Patrick Smiths, elder and younger, or by the said John Smith, or his heirs, on payment or consignation as therein directed, of the foresaid sum of 4000 merks. The deed contains a precept of sasine, upon which Alexander Smith was also infeft bafe on the 16th, and his sasine recorded the 31st of Octob. that year.

The said John and Alexander Smiths survived their father, and John having died soon after, was succeeded by his son, an infant, and after his death, by several minors, one after another. Alexander came thereby, sometime between the year 1660 and 1670, to attain possession of the lands for payment of his patrimony, and in virtue of his annualrent-right, he, and those deriving right from him, continued to possess the lands for upwards of fifty years, without being called to account.

In 1675, Alexander Smith disposed this right of annualrent, with the 4000 merks, on payment of which the same was redeemable, to Scot of Gibbistoun, who was also infeft, and, after having possessed the lands till the 1683, disposed the said annualrent to Patrick Fca of 1683. Whitehall. Upon this disposition Patrick Fca was infeft, and entered to the possession of these lands, which he and his descendents, down to James Fca of Whitehall, now of Cleskeran, the present defender, have kept to this day.

In the year 1723, Hew Smith writer in Edinburgh, grandson and apparent heir of the said John Smith, being desirous to recover possession of these lands, which were worth a great deal more than 4000 merks with which they were burthened, and being well informed, that the debt was overpaid, both principal and interest, by intromissions with the rents of the lands beyond the legal interest of the money, he determined

to prosecute his right. And for that purpose, in order to make up a title to the infestment which had stood in the person of his grandfather, he granted a trust-bond to Robert Robertson of Tillybelton for L. 30,000 Scots, whereupon he was charged to enter heir in special, in the above, and several other lands which had belonged to the said John Smith.

In 1724, a decret of adjudication was obtained in name of Mr Robertson, adjudging the several lands from Hugh Smith, as thus charged to enter heir for payment of the accumulated sum of L. 36750 Scots.

Upon the title of this adjudication a process of reduction, improbation, declarator of extinction and property, maills and duties, compt, reckoning, and payment, was brought in the name of Mr Robertson, against James Fea of Whitehall, as pretending right to, and possessing the said lands; and against sundry other defenders possessing 'or claiming right to other lands therein mentioned.

Besides the usual conclusions in a summons of this kind, particularly that the defender Fea of Whitehall should hold just compt and reckoning for his and his authors intromissions with the rents of these lands, whereby it would appear that he was overpaid of what was justly owing to him, there is a special conclusion for having it found and declared, "That the pursuer upon his adjudication had the best and undoubted right to the foresaid lands, preferable to the defenders their whole rights and pretences, and that he ought to be ordained to be put in possession of the foresaid lands above specified, and impowered to let, use, and dispose thereupon heretably as his own proper lands and heritages, and the defenders discharged from troubling him or his tenants in the possession thereof in time coming."

In this process there appears, between the years 1726 and 1732, to have been a very obstinate litigation, which was conducted by some of the most eminent counsel of those times. It would be tedious and unnecessary to recapitulate minutely the various steps of procedure; only it may be observed, that Whitehall appears to have been so sensible of the truth of the alledgeance that his debt was over paid, and apprehensive of a proof of the super-intromissions, that he had recourse to every dilatory defence which could be thought of; and after all his objections to the pursuer's title were repeatedly over-ruled, he resorted to many nice points of law, which were very keenly contested, concerning the nature and effects of his right, and the intromissions which had followed thereupon; and, amongst other things, contended that he being a singular successor was not liable for the intromissions of his authors, and that his own intromissions

missions were not sufficient to extinguish the debt, especially as they could only be imputed from the time of the citation in that action.

Jan. 6.
1727. Of this date, the Lord Ordinary found, "That the infesment of annualrent founded on by the defender ought to be restricted to the legal annualrent, conform to the several acts of parliament; and so far as the defender or his authors have thereby uplifted more than their legal annualrent for the time, that the same must impute to the extinction of the 4000 merks contained in the clause of redemption of the said right, and ordained the defender to give in an account of charge and discharge against himself, for his and his authors introductions with the rents of the lands in the said right."

July 19.
1727. And to this interlocutor the whole Lords adhered, after advising several reclaiming petitions for the defender, and by their final interlocutor of this date, found, "That the rents or payments over the legal interest must impute *in fortem* since the time the interest fell due."

July 15.
1731. After this the proceedings having been stopped by the death of Fea of Whitehall, the process was at last transferred against James Fea his son, and of this date the Lord Ordinary "granted to either party a conjunct probation *prout de jure* of the time of the defender and his authors their entering to the possession of the lands and estate of North Strynie, and of the yearly rent thereof, and allowed the defender to prove the deductions from the said rent, public burdens, &c. and granted a commission for taking the proof in the country.

Accordingly commissions having been extracted by both parties, a long proof on the several points before mentioned was led in the month of October 1732, and a variety of writings were recovered and produced as evidence of the facts in dispute.

The said Hew Smith, for whose behoof the process had been carried on at the instance of his trustee, having died soon after, leaving an only daughter Jean Smith, an infant without tutors or curators, the process was stopped during her minority. But, in the year 1759, she having been married to the respondent Alexander Mercer, the process was at last awakened at her and her husband's instance, and remitted to Lord Alemoor as Ordinary.

The titles produced for Mrs Mercer were, the foresaid bond by Hew Smith to Robertson of Tillybelton, with the special charge and adjudication at his instance; and an extract of a disposition and assignation to the foresaid bond, and all that had followed or should follow thereon, granted by Tillybelton to Alexander Jekton writer in Edinburgh, of this date, and registered in the books of Session; extracted disposition

Sept. 17.
1741.

5
fition and assignation granted by John Donaldson surgeon in Perth, their Jan. 26.
in general served and retoured to the said Alexander Jackson before the 1745.
Sheriff of Perth, conform to general service, dated 11th February
1743, duly retoured to chancery, whereby he disposes to the said Jean
Smith, her heirs and assignees, the foresaid bond, decreet of adjudica-
tion led thereon, lands thereby adjudged, and conveyances thereto, re-
gistered in the books of Session.

After some proceedings before Lord Alemoor, his Lordship, of this
date, "remitted to Mr Francis Farquharson comptant, to make up a Jan. 24:
"state of the cause, and abstract of the proof, so far as concerned 1761.
"Fea of Whitehall and his predecessors, their intromissions with the
"rents, profits, and duties of the lands of North Strynie, and others,
"belonging to the pursuers, over and above the legal interest of the
"sum for which the lands were impignorated by the pursuers prede-
"cessors, agreeable to the proof and former interlocutors of the Court,
"and thereupon to bring the same to a balance, whether against or in
"favour of the pursuers, or shewing that the foresaid sum has been
"totally exhausted by the defender and his predecessors intromissions,
"as aforesaid."

Of this date, Mr Farquharson gave in a very full and accurate report, July 27.
stating, *first*, the term of entry. *2dly*, The amount of the rent, as 1762.
proved. And, *3dly*, The deductions therefrom; and subjoined an ab-
stract of all the different proofs of the rent at different periods, from the
year 1662 downwards. And from the whole of these brought out a
medium of L. 177 : 9 : 4, as the rent which had been drawn by the
defender and his authors and predecessors out of the lands in question.

From this report it was obvious, at first view, that the intromissions
by the defender, and his authors, did greatly exceed the whole 4000
merks, and interest thereof; and that, consequently, the annualrent
right was long ago extinguished, and a considerable balance due to the
pursuers: This is evident from one circumstance alone, without enter-
ing further into the calculation, or making a periodical imputation of
the surplus, so as to reduce the capital annually: For, if L. 177 : 9 : 4,
shall be held as the rent by which the defender must account, it is
plain, that this sum exceeds the annualrent of 4000 merks; which, at
5 *per cent.* is only L. 133 : 6 : 8, in the sum of L. 44 : 2 : 8; and as
interest has been at 5 *per cent.* ever since the year 1705, the defender
has now enjoyed that surplus for 64 years, and the debt of 4000 merks
is thereby totally extinguished. And if the surplus also received an-

usually preceeding that period, from the 1668 is also brought into the computation, the defender will be due a very considerable sum.

But as the chief view of the pursuers was, to obtain possession of the lands, and to have this annual rent declared to be extinguished, without proposing to recover any thing from the defender, from whom little could be expected, they were not anxious about pushing the consequences of this report so far as they might have gone; nor were they at the trouble of making objections, on their part, to Mr Farquharson's report in several articles, by which the balance might have been brought out still greater in their favour; what they aimed at was, only to recover the lands, with as little delay and expence as possible.

On the other hand, the defender seeing the consequences of the report as it stood, tried all the arts of litigation, in objecting to the report, and disputing the *data* assumed by Mr Farquharson. After various procedure before the Lord Ordinary, it was at last ultimately fixed, by interlocutor of the 18th February 1764, that the possession of the defender's authors had commenced in the year 1668, and had been continued ever since. By the same interlocutor it was further found, "That the
"rent of these lands shall to be computed at a medium of the proof by
"witnesses, the tack 1662, the tack 1676, the contract 1700, and
"the tack 1709; which medium appears from the 11th page of the
"subauditor's report to be L. 141 : 11 : 11; and that no certain evi-
"dence of the rent arises from the dispositions 1649, 1675, and 1683." The interlocutor further approves of the report as to all the other articles; and "appoints an account to be instituted upon these premises,
"and that the excess rents above the legal interest of 4000 merks shall
"be imputed in extinction of the said principal sum; and remits to
"Mr Farquharson to make out the said account, and report."

Both parties represented against this interlocutor. The defender on all the various grounds which had been formerly urged by him as objections to the report; the pursuer only on one ground, viz. the rejecting the proof of the extent of the rent arising from the original disposition of subaudrent and the subsequent conveyances thereof; by which the medium of L. 177 : 9 : 4, stated in the report, had been reduced to L. 141 : 11 : 11. The Lord Ordinary refused both representations.

In order to determine, whether it would be proper to struggle this point any further, a calculation was directed to be made how the account would stand upon the *data* pointed out by the Lord Ordinary's interlocutor of the 18th of February 1764 above recited. This was done; but (doubt) some unlucky misapprehension or mistake in figures, it was
imagined

imagined that the calculation would turn out in favour of the pursuers ; and that the debt would still be more than over paid. Upon the supposition that this was truly the case, the interlocutor was acquiesced in on the part of the pursuers ; and Mr Francis Farquharson having died soon after, any further procedure in the cause was thereby stopped for some time.

On the 15th July 1767, the process, after being wakened, was called before Lord Alemoor, and was again “ remitted to Alexander Farquharson accountant, to make up an account agreeable to, and in terms of the interlocutor of the 18th February 1764, and to report.”

The pursuers were all the while going on upon the supposition that the account would turn out in their favour : They were therefore exceedingly surprised when Mr Farquharson’s report came out in November 1767, to find that instead of the debt being paid and a balance due to them, the whole principal sum remained intire, and a balance of L. 95 : 6 : 11, Scots of interest, said to be due to the defender at Whitsunday 1767. And this was the more vexatious, as it did not appear in what manner it could be got the better of, seeing the interlocutor of the 18th February 1764, which had fixed the *data* on which the account was to be instituted had long become final.

Upon considering the proof attentively along with Mr Farquharson’s original report, it seemed plain that the rule established by the Lord Ordinary’s interlocutor for fixing the extent of the rent to be only L. 141 : 11 : 1, was liable to several just exceptions, and was different from Mr Farquharson’s report ; and that thereby, the pursuers were greatly hurt : But there seemed to be no remedy ; and it was thought better at any rate rather to pay up the money, and get possession of the lands, than to allow the defender to keep them any longer : With this view, during Lord Alemoor’s indisposition, a remit having been obtained to Lord Gardenston, the cause was called before him on the 10th of February 1768, when it was craved for the pursuer, “ That the Lord Ordinary would find that upon
“ the pursuers making payment to the defender against the term of
“ Whitsunday then next, of the principal sum of 4000 merks and
“ L. 87 : 1 : 8, Scots of interest then due, and in case of his refusal
“ by consignation thereof in the hands of any responsible person with-
“ in the burrow of Kirkwall, upon the peril of the consignee, then to find
“ the lands lawfully redeemed from the defender, and decern and de-
“ clare accordingly ”

To this the defender objected, that the original libel contained no conclusion for redemption, and was only for compt, reckoning and payment ;

payment; and therefore all that could be found was, that the defender's right subsists as a security to the extent of the sums found due by the accomptant's report, and reducing and improving *quoad ultra*, and, if the pursuers pleased, they might then follow out the redemption as prescribed by the wadset right.

The Lord Ordinary repelled this objection made by the defender, and reduced, decerned and declared as craved for the pursuers.

Against this interlocutor the defender reclaimed, and the petition was ordained to be answered on the 10th March 1768.

May 6. 1768. Soon after, the said Jean Smith pursuer, spouse to the respondent Alexander Mercer, died, and since that time, as her children are all minors, the process has lye over till now, that there is produced a disposition by her and her said husband in favour of themselves in conjunct fee and liferent, and to their children in fee; whom failing to the said Alexander Mercer, his heirs and assignees, of the said lands of North Struggle and others, and of the aforesaid adjudication and conveyances thereof above recited.

In virtue of this right, the said Alexander Mercer, for behoof of himself and his infant children, is intitled to carry on this action, and to redeem the sinefold lands: And on their behalf these answers are humbly offered.

After to full a detail of the circumstances and proceedings in this case, it will be unnecessary to trouble your Lordships with many words in answer to the arguments urged in this petition. The plan of the petitioner seems evidently to be, to try to spin out the dispute, and thereby to retain a beneficial possession as long as he possibly can: Not contented with having obtained a victory, to which at bottom he had no manner of title, and by which he is found intitled to more than his original principal sum, altho' the same is in reality clearly overpaid by his intromissions, he is still unwilling to yield, or quietly to accept of the sum found due, and which has been repeatedly offered him. Such conduct, surely, deserves no degree of favour, nor will your Lordships be inclined to listen to captious or specious legal arguments, not founded in equity and real justice.

The petitioner, in the first place, objects to the title upon which this process was originally commenced, viz. The adjudication at Tillybelton's instance against Hew Smith; and it is said, "That this could be no sufficient title in a declaratory action of redemption of the petitioner's right, which clearly excluded that of the pursuer. That in order to exclude any person to redeem the wadset, each person must have a clear right to the reversion. But that there is no evidence of the said

“ said Hew Smith’s relation to the granter of the wadset right, or that he had any right whatever to the reversion of the lands.”

It must readily occur to your Lordships, that this objection, had there been any thing in it, fell properly to have been made *in initio litis* : And accordingly it appears from the extracted act in process, that it was the first thing that was stated ; and was expressly over-ruled by an interlocutor, of this date, on this just ground, that the propinquity was notorious and perfectly well known to the then defender himself : That an adjudication on a trust bond was always sustained as a sufficient title in such processes ; and that, at any rate, the objection was too late, after the defender had owned the title, by taking terms, and making productions. Ever since the date of that interlocutor, the title has been acquiesced in, and all the proofs and litigation in the cause have proceeded thereon ; after which it seems strange to resort to such an objection at this distance of time.

Dec 21
1726.

In the *second* place, the petitioner objects, “ That the present pursuers have produced no right whatever to that adjudication ; and that without a back-bond or conveyance in their favour, they are not intitled to redeem.”

Answered. The pursuers titles, as above stated, are produced in process, being regular conveyances from Tillybelton the original trustee, and dispositions by those deriving right from him, which fully vest the right in the present pursuers ; and their title has also been acknowledged by the defender, who has maintained the dispute against them, without making any such objection till now.

3tio, It is said, “ That in the event of a legal redemption, the petitioner is not *in titulo* to give a valid renunciation, seeing he never has been infeft, and never could obtain a precept of *clave constat* ; as the pursuers or their authors or predecessors never were infeft in the wadset lands, and so cannot with any propriety pursue against the petitioner a declaration of redemption.”

Answered. It must be obvious, That this very ingenious argument can be thrown out with no other view, but to help to give some colour or pretence to the defender’s plea ; and that any objection to the nature or validity of the renunciation to be granted by him, would have come more naturally from the pursuers, in whose favour it is to be granted. If they are satisfied with it, he will have no cause to complain ; and

proper care will be taken to put him in a capacity to execute the same effectually, by granting him a precept of *clare constat* in due time. It is a mistake to say that no infesment has ever past in the wadset lands. The original reversioner stood infest as above recited, and the pursuers, his great grand children, can connect their titles regularly with him. If the defender executes the renunciation required of him, he has no further concern in the matter, and may leave the rest to the pursuers.

4^{to}. The petitioner argues, " That the present process is not a declarator of redemption, but on the contrary, a process of improbation and reduction, which is quite the reverse of such a declarator. That the pursuers instead of admitting, as in a declarator of redemption, that the wadset was a subsisting and effectual right, and concluding that the pursuers were intitled to redeem the same by payment of the whole or any part of the wadset sum ; it has been till now insisted that the said right was either null *ab initio*, or that at least it was totally extinguished by possession ; and that as the pursuers had failed in this, the consequence was, that the defender ought to be absolved from the improbation, reserving to the pursuers, if truly in the right of reversion, to follow out the redemption as accords".

Answered. The respondents humbly apprehend that the process, as originally brought, was in every shape proper, and adapted to the end in view. The right in question was not a wadset right, as the petitioner affects throughout to call it, but a simple right of annualrent which had been given as a security for a provision of 4000 merks to a younger son. The annualrenter, and those deriving right from him, had continued in possession of the lands over which it was constituted ; and by their superintromissions, it was well known were much more than overpaid of their whole principal sum, and interest due thereon.

The usual and most approved method of calling such a possessor to account was, after an adjudication on a trust bond, granted by the person having the right of the reversion, to bring a process of improbation, compt, reckoning, and payment, and declarator of extinction. On the supposition that the debt was truly extinguished, this was the only proper course to follow, and to have insisted, as the petitioner here contends for, that the pursuer should be intitled to redeem on payment of the whole, or any part of the wadset sum, would have been highly absurd, and directly contrary to the alledgeance on which the action was founded ; especially, as all the effects of such a conclusion in the Noel, was fully supplied and saved by the other proper conclusions

in the summons, viz. The compt, reckoning, and payment, and declarator of extinction. It was undoubtedly competent at all times in such action, to say to the defender, your debt is already paid and extinguished by your intromissions, or if there is any thing still remaining due to you, it is ready to be paid, and you are bound upon receiving your money, to yield possession of the lands in terms of the clause of redemption in the annualrent right. The defender had no right to ask more than this, and where nothing but justice was in view, the litigation might have been very short.

It is true, that in this case it has ultimately been found, that the defender has not been overpaid by his intromissions; but still this, which was occasioned as before mentioned, by an erroneous calculation in figures, will not hinder the pursuers from calling him to a compt and reckoning, or prevent their being intitled to pay him the sum found due to him, and thereupon to obtain a decree of extinction of the debt in question, and to regain possession of the lands to which they have a just right.

There was therefore, with submission, not the least occasion or necessity for inserting a clause of declarator of redemption in the original summons, or for insisting upon the same in the present state of this action. The acknowledged title of the pursuers to carry on the compt and reckoning, and to pay off what should be found due, is of itself sufficient to intitle them to redeem, and to oblige the defender to renounce his annualrent right, in case a formal renunciation by him should be thought necessary. And in this point, there is in law a plain distinction between a wadset right and a right of annualrent. A wadset gives a right of property in the subject, which subsists till such time as the power of redemption is exercised; and on that account, the law has required a declarator of redemption attended with all the formalities prescribed, and a regular renunciation duly registered, in order to re-establish the reverser in the full right of the lands: But a right of annualrent does not carry the property of the lands; it only creates a real *nexus* or burden upon the property, for payment of the annualrent contained in the right. It is considered only as a servitude upon the property, and is consequently consistent with the right of property subsisting in the debtor or his heirs, and may be extinguished not only by payment or intromission, but without all these formalities, by resignation or renunciation which are requisite in the case of wadset rights. And in this respect, the established rule which takes place with regard

to

McDowal.
vol. 2. p. 124

to adjudications within the legal, is equally applicable to rights of annualrent. In the case of an adjudger's being in possession, a summons of compt and reckoning executed against him within the legal, will perpetuate it until the compt and reckoning is closed; and if there is any overplus owing to the adjudger, the debtor will be allowed to redeem, on payment of the same at the bar, or within such time as shall be limited by the Court of Session. This equitable and just rule is what the respondents contend for in the present case; and they are ready at such time, and in such manner as the Court shall direct, to make payment to the defender of every farthing which he can pretend to claim under this annualrent right. The Lord Ordinary was clearly of opinion that the defender was intitled to nothing more; and that this objection of a pretended defect in the original summons came now greatly too late for the first time, after forty years litigation in the cause. It is apparent indeed that it is only now started with a view to create delay, and to keep the defender so much longer in possession.

It would be very improper to waste your Lordships time, by following the petitioner through the rest of his arguments, quotations, and decisions, because, with great submission, they do not at all apply to the present case, but relate to wadset rights, which stand intirely on a different footing from that of rights of annualrent; and even as to wadsets the petitioner is forced to admit the relaxation which now takes place, of the rigorous observance of the ancient rules, with regard to orders and declarators of redemption; and a great variety of decisions might be cited, to show how much your Lordships have been disposed to dispense with the formalities enjoined in deeds of this nature, when the payment was offered to be made equally, or more conveniently for the defender.

The petitioner concludes with observing, that on the belief of his being still to hold these lands as his property, he had some time ago granted a tack thereof, of which some years are yet to run; and that he had repeatedly made offer to the pursuers, provided they would take this tack off his hand, that he would accept of the sum found due to him, renounce his right, and assign the tack to the pursuers. But that these reasonable offers had been rejected, which showed that the pursuers had only in view to challenge the tack, and thereby involve him in a question of damages with the tenant upon the warrandice.

With regard to the tack here mentioned, it is *triti juris* that the same can subsist no longer than the right of the defender from whom it was derived; and the defender was so far from having any reason to induce him

him to think that it would be allowed to stand good, that, on the contrary, he was warned not to grant it, and was *in pessima fide* to do the same, at the very time Mr. Farquharson had given in his report, which showed clearly that his debt was overpaid, and that his right behoved to be at an end.

And as for the offers alledged to have been made by the defender, it is surprising this should have been mentioned in the manner it is done, after every fair proposal of accommodation made on the part of the pursuers has been so often rejected by the defender, who, in order to maintain himself in possession, has put the pursuers to much unnecessary trouble and expence by a most obstinate litigation.

In respect whereof, it is humbly hoped your Lordships will adhere to the Lord Ordinary's interlocutor; and find, that the defender is bound to accept of the sum found due to him, at such time and in such manner as the Court shall direct, and thereupon declare the right of annual-rent extinguished.

GEO. HALDANE.

The Lord. adhered



Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N
O F

JAMES FEA of *Clestrain*;

Humbly sheweth,

THAT the petitioner was for many years an officer in the army; and when holding the rank of a lieutenant, was reduced at the general reduction of the forces, after the late peace. About the same time, he succeeded as heir-male to the estate of *Clestrain* in *Orkney*; but his predecessor having executed sundry deeds in favours of his sisters; and being burdened with a great load of debt, the petitioner has hitherto reaped no material benefit from that succession.

Sometime before the defender left the army, and while stationed in *Ireland*, he contracted an intimacy with a young woman, named *Anne Corbet*, a native of that kingdom, of a gay and enterprising disposition, as the petitioner afterwards found to his cost.—This Lady he brought with him to *Scotland*, where she lived with him for some months, took his name, and passed for his wife. But his circumstances not being suitable to her gay temper, she thought proper, without the least provocation, to elope from him, and went to *London* in the year 1765, where she has a brother, *Richard Corbet*, an attorney; and has never since returned to the petitioner's family, though the petitioner, at her brother's desire, was at the trouble and expence of making a journey to *London* in August 1765, in order to reclaim her.

Soon.

Soon after her coming to *London*, her brother, Mr. *Corbet*, provided her with lodgings in the house of *James Donaldson*, at the rate of 20 s. a week; and *Donaldson* being a linen-draper, he furnished her with a variety of goods, within the space of a few months, to the amount, in whole, of above 90 l. *Sterling*, whereof, after sundry partial payments, there is said to be still remaining due 47 l. 13 s. 10 d. Not satisfied with these extravagant furnishings, it is said *Donaldson* recommended this Lady to other tradesmen of his acquaintance, who furnished her with different articles during the same period, to the extent of near 20 l. more; and, for ought the petitioner knows, she may have contracted other debts, exceeding all he is worth in the world.

At the time these furnishings were made, neither Mr. *Donaldson*, nor the other furnishers, had any personal knowledge of the defender, far less any authority from him, to give credit for these articles to this Lady. They saw her alone, in the state of an unmarried woman, and none of them could have any reasonable expectation, that the defender was to be their pay-matter; and therefore they must have made the furnishings on the faith and credit of the Lady or her brother. Indeed, of this fact, Mr. *Donaldson* has furnished strong evidence; for not only does he give credit, in his account, for sundry partial payments, but it is proved and acknowledged, that he likewise received from her, in *October* 1765, a draught upon Mr. *Corbet*, her brother, for 28 l. *Sterling*, being the sum that by his account appears to have been then due.

However, Mr. *Donaldson*, for himself, and five of his friends, thought proper, sometime ago, to bring an action, in this court, against the petitioner, concluding for payment of certain accounts of furnishings made to this lady, while living in *London*. This process came of course before the Lord *Levee* Ordinary, who allowed a proof of the furnishings. A proof was accordingly taken by the pursuer, upon commission at *London*, *ex parte* of the petitioner; upon advising which, with memorials for both parties, his Lordship, on the 18th *July* 1767, pronounced this interlocutor: " Having considered this memorial, &c. and, particularly, having considered that it is alleged by the pursuer, " and is not denied by the defender, and is sworn to by one of " the witnesses, *James Pattison*, that the defender lodged along " with his wife in the pursuer's house in *August* 1765; and that " it

“ it is not alledged, that he gave any intimation to the said pursuer, or to the other persons who have indorsed their accompts to him, not to give credit to his wife; repells the defences pleaded for the defender.—Finds the furnishings sufficiently instructed, except the article of 17 s. 11 d. *Sterling* for candles; and therefore decerns against the defender for payment of the whole sums libelled, except the said sum of 17 s. 11 d. *Sterling*; but, before extract, ordains the pursuer to produce Mrs. Fea's draught on Mr. Corbet for 28 l. *Sterling*.”

Against this interlocutor the petitioner having given in a representation, the Lord Ordinary, upon advising the same, with answers, on the 17th *November* 1767, pronounced this interlocutor: “ Refuses the desire of the said representation, and adheres to the former interlocutor, with this variation, *it is denied* by the defender, that he lodged in the pursuer's house, alongst with his the defender's wife, but which is not material for obtaining an alteration of the former decerniture, as it is in proof, by two witnesses, that he did lodge in the same house with her in *August* 1765: And in respect that the draught upon *Richard Corbet* is now produced, allows the decret formerly pronounced to be extracted.” And a representation having been offered for the petitioner, praying to be allowed a proof of certain facts, if denied by the pursuer, answers were put in thereto; and the protest on *Richard Corbet's* bill, as also a certificate said to relate to the petitioner's marriage, were produced therewith, and thereupon the Lord Ordinary, on the 2d of *February* last, *refused* the desire of the representation.

The petitioner having about this time transmitted to his agent some letters he had accidentally preserved, respecting this matter, the same were produced, with another representation; and answers having been put in thereto, the Lord Ordinary, at a calling on the 25th *June* last, when the pursuer moved for expences, was pleased to pronounce this interlocutor: “ Refuses the desire of the representation, and adheres to the former interlocutor; and upon the defender's making payment to the pursuer of the sum of 2 s. 6 d. being the expence of protesting the above mentioned bill, ordains the pursuer to deliver up the said bill and protest, with an assignation thereto, to the defender: Finds the defender liable in the expence of extract-
“ ing

"ing the decret, as the same shall be liquidate by the collector's receipt, but finds no other expences due, and decrees."

But as in writing out this last interlocutor, an omission had happened with respect to the form of the assignation of *Corbet's* bill, which the Lord Ordinary had appointed to be granted to the petitioner, the same was mentioned in a short representation; and his Lordship, on the 13th *July* instant, "found, that the pursuer " must grant an assignation to the bill, with warrandice from " fact and deed; and refused the desire of the representation as to " the other points."

The petitioner now humbly proposes to submit these interlocutors to your Lordships review; and in so doing, he humbly hopes to meet with the greater indulgence, as his case will appear to be attended with peculiar hardship; and that should he fail in his defence against this claim, he may be in danger of ruin from others of the like kind, founded on contractions in a foreign country, to which he had no access, and which it was not in his power to prevent.

The petitioner does not now propose to trouble your Lordships with contesting the evidence brought of the furnishings libelled having been actually made to *Anne Corbet*, excepting one article already disallowed by the Lord Ordinary: As these articles do, however, in the space of a few months, amount to more than the petitioner can afford to spend in a year, and as they are noways such as correspond to a reasonable aliment, but to gratify a taste for extravagance and luxury, so these circumstances will have their due weight with your Lordships in considering the petitioner's other defences against this claim.

The grounds upon which the pursuer has endeavoured to substantiate the petitioner, have, in substance, resolved into these: That the petitioner being married to *Anne Corbet*, is liable for her debts: That the pursuer and his cedents made the furnishings libelled, on the faith of the petitioner's being liable for the same, as she then took the name of Mrs. *Tee*; and that the petitioner did no ways impede them from giving such credit; but, on the contrary, did lodge some time in the pursuer's house, along with her as his wife.

The petitioner shall controvert these grounds in the sequel, and endeavour to show, *viz.* That there was no subsisting or essential marriage

marriage between him and *Anne Corbet*, such as by the law of *England*, where the marriage is said to have happened, and where the furnishings were made, could have subjected him for the same. 2dly, That it was not upon the petitioner's faith or credit, as the husband of *Anne Corbet*, but on her own credit, or that of her brother, that those furnishings were made, and from whom payment ought to be recovered if still due: And 3tio, That supposing *Anne Corbet* to have been lawfully married to the petitioner, and that the furnishings had been made on the belief thereof, yet the petitioner ought not to be subjected, in respect of her desertion, and other peculiar circumstances of the case.

With regard to the *first* of these points, your Lordships will observe, that the connection between *Anne Corbet* and the petitioner is agreed to have begun in a foreign country; and their pretended marriage is said to have happened in *England*, by the laws of which country its validity falls to be determined, especially in this question with the pursuer, an *English* creditor. The petitioner has not denied, that he did for some time cohabit with her in this country, and suffer her to take his name; but that is not sufficient, by the *English* laws, to constitute an effectual marriage. The pursuer, sensible of this, has produced a certificate, dated 14th December 1767, signed, *Isaiah Jones, curate*, bearing, That “*James Fea*, of the parish of *St. Clement Deans*, batchelor, and *Anne Corbet*, of the same parish, spinster, were married in that church “by licence, upon the 21st June 1759, in presence of *Richard Corbet* and *Robert Johnston*.” But it is obvious, that this certificate, half printed, half wrote, cannot be sustained here as probative, or as legal evidence of the petitioner's marriage. The names of the parties are indeed the same, but there are no designations given to either of them, such as can distinguish them with certainty, or such as might not apply to any other persons of the same names.

But further, supposing this certificate to apply, and to prove the actual celebration of a marriage; yet the same must have been absolutely void and null, in respect that *Anne Corbet* was at that time under age, and that no consent was given by parents or guardians. The *English* marriage act declares, “That all marriages solemnized by licence, after the 25th of March 1754, where either of the parties, not being a widower or widow, shall be under the age of 21 years, which shall be had without the con-

Stat. 26,
Geo. II.
c. 33

“ sent of the father of such of the parties so under age (if living) first had and obtained, or (if dead) of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then of the mother, if living and unmarried; or, if there be no mother living and unmarried, then of a guardian, or guardians, of the person appointed by the court of chancery, *shall be absolutely null and void*, to all intents and purposes whatsoever.” The statute likewise specifies the form of the entry in the parish registers, and, when either of the parties are under age, specially requires the consent of the parents or guardians to be therein ingrossed, which the certificate here produced does not contain; and therefore, supposing that it did apply to the parties, yet, on account of *Anne Corbet's* minority and want of consent, the marriage itself must have been void and null.

It likewise appears, and can be proved, that *Anne Corbet* herself did consider the matter in that view; and that, after having deserted the petitioner, and resided some time in *London*, she was actually married in *May 1766*, at *St. Ann's church, St. As, to one Mr. Samford*, a gentleman of considerable fortune. This fact she herself acquainted the petitioner of by a letter, in which she desired him to show, that he ever had any right to her; and *Richard Corbet*, her brother, likewise wrote to the petitioner to that purpose, about the same time; although the petitioner unfortunately lost or destroyed these letters upon receiving them, not thinking that they would have been necessary for his defence against this claim.

The fact, however, can still be clearly instructed: neither has the pursuer himself explicitly denied his knowledge of the truth of it; and, in order to show, that the petitioner did not advance the same without good cause, he produced a letter directed to himself, which he had accidentally preserved, from one *Mr. Casper of London*, to whom he wrote for further information on the subject. It is dated *October 22d 1766*, and contains the following passage relative to this lady:—“ You may take this for granted, that she was married in the last at *St. Ann's church*, and her brother was employed as a strange lawyer to draw the witness, to testify on her *marriage*. He did not give her away, as you think, but was introduced as her brother some time after.”

“ He is a man of fortune and family, and they are already parted. He was certainly arrested for her debts ; but he gave bail, and there will be a trial soon ; and I am told, that she intends to swear, that she was under age when she was married to you, &c.” The petitioner has likewise been since informed, that a trial actually did proceed, as to the validity of her marriage with Mr. *Sandford* ; and that she prevailed in that trial, whereby any marriage between her and the petitioner was proved to be null and void ; and that, in consequence thereof, this pursuer Mr. *Donaldson*, among others, actually made a claim upon Mr. *Sandford* ; (though he now denies it ;) and that Mr. *Sandford* paid some of her debts.

From these facts it appears, that the petitioner cannot in this question, be considered as the lawful husband of *Anne Corbet*, and consequently, that the foundation of the pursuer’s action entirely fails : Neither could it avail him, should your Lordships incline to be of opinion, that a man’s cohabiting with a woman, and suffering her to take his name as his wife, might, by our law, subject him for suitable furnishings to her. The pursuer’s claim fails to be tried by the law of the country where the furnishings were made, and where the alledged marriage is said to have happened ; and the petitioner is informed, that, by that law, nothing less than a valid and effectual marriage, proved or acknowledged, or the man’s expressly engaging to pay for such furnishings to the woman can make him liable for the same ; and there is no reason why the pursuer should have an advantage over the petitioner, by bringing his action against him here, which he would not have had, if he had brought it in any of the courts of *Westminster-hall*.

But *2do*, supposing, that even in *England*, a woman’s being reputed the wife of a man, though not truly such, joined with the furnishings being made on the credit of the supposed husband, on the faith and belief of his being liable for the same, could be sufficient to subject him ; yet it will appear, that the furnishings in question, were not made upon any such faith or belief, but upon the credit of the lady herself, or her brother.

When *Anne Corbet* went to *London* in *February 1765*, it is not pretended that the petitioner accompanied her, or that this pursuer Mr. *Donaldson*, or any of the other furnishers, his cedents,
knew

knew any thing about him, or had ever seen his face. The petitioner was then in *Oxford*, at the distance of 700 miles from her; and as she had deserted, and gone off without his consent, it cannot be presumed, that persons who were utter strangers to him and her, would make those furnishings to her in *London*, upon the faith of being paid by him, without any mandate or authority from him.

Again, upon her arrival at *London*, the petitioner is informed, that *Richard Corbet*, her brother, did first procure lodgings for her in *Cecil street* in the *Strand*; but having been obliged to remove from thence, *Corbet* took the lodgings in question for her, at the house of the pursuer, Mr. *Donaldson*; and there is good reason to believe, Mr. *Corbet*, on that occasion, became expressly bound to pay Mr. *Donaldson*.

Anne Corbet appears to have continued in Mr. *Donaldson's* till after *November 1765*; and during her residence there, the furnishings said to have been made by Mr. *Donaldson* alone, including room rent at 20 s. per week, amount to above 90 l. *Sterling*, and the other furnishings by different persons, now pursued for, to about 20 l. *Sterling* more: But of the sum due to Mr. *Donaldson*, it appears from his own account, that he received in *March 1765*, 4 l. in *June 20 l.* and in *August 15 l. 2 s.* making in whole, 39 l. 2 s. and that for the balance of 28 l. due in *October 1765*, a bill dated 18th *October 1765*, payable to Mr. *Donaldson* six months after date, was drawn by the lady, upon her brother *Richard Corbet*, and actually accepted by him; and which bill, the pursuer has been obliged to produce in this process, together with a protest taken on the 27th *April 1766*, bearing, that payment was demanded from *Corbet* the acceptor; and that he answered, "That he could not pay the said bill for want of effects."

From these circumstances, of the payments made to the pursuer from time to time, while the petitioner was in *Oxford*, and of the posterior draught by *Anne Corbet* upon her brother, accepted by him, there is real evidence, that it must have been on the credit of the lady and her brother, and not of the petitioner, that those furnishings were made. Further, it has been averred by the petitioner, and not denied by the pursuer, that some time after she came to lodge in his house, and while the petitioner still continued in *Oxford*, Mr. *Corbet* having got from the pursuer his bill or account, so far as then incurred, thought fit to try if the
petitioner

petitioner would pay it, and with that view, sent it to Mr. *Lindsay* merchant in *Kirkwall*, who accordingly made a demand, which the petitioner absolutely refused to answer, and told Mr. *Lindsay*, that he did not consider himself as liable for one shilling of such contractions.

This refusal was reported to Mr. *Corbet*, who thereupon wrote the petitioner a letter, in process, dated 4th *June* 1765, wherein he endeavoured to apologize for the misconduct of his sister; begg'd earnestly of the petitioner to forgive it, and intreated him to come up to *London*, and try to carry her back to *Scotland*, though he owns, that she seemed determined not to return. He then adds, "As to running you in debt, she utterly denies it.—" "To be sure, her travelling about, has cost a good deal of money since she has been here: *I have made it as easy as I could*:" "I wish you had honoured the bill in favour of *Donaldson*, as it might have prevented some talk between people utterly ignorant of the matter, and who perhaps might put constructions foreign from the real case; *so that I have this day paid such bill*, and said I received a bill from you for that purpose, which was the reason of your not paying it."

From the tenor of this letter it is submitted, that the petitioner had no room for apprehending, that the Lady was continuing in *London* upon his credit, or at his expence. However he acknowledges, that his attachment to her, joined with her brother's intreaties, did prevail on him to make a journey from *Orkney* to *London* in *August* or *September* 1765. But he got his labour and expence for his pains: She was resolved to have no further connection with him, and absolutely refused to quit *London*: Upon which, after a short stay there, he returned home, and has never seen her since; and there she has disposed of herself in the way already mentioned.

The pursuer has alledged, that while the petitioner was then in *London*, he lodged in his house alongst with *Anne Corbet*, and great weight was laid on this circumstance by the Lord Ordinary. It is indeed true, that in the proof of the furnishings, which was taken by the pursuer at *London*, *James Pattison*, his own journeyman, deposed *inter alia*, "That in the month of *August* 1765, the said *James Fea* lodged with his wife in the house of the said *James Donaldson*." And *Elizabeth Murray*, the pursuer's maid-servant, is marked as deposing "conform to the preceding witness,

"ness, *Pattison*, in all points." But it is to be observed, that these witnesses were not only examined in absence of the petitioner, by a commissioner of the pursuer's own nomination, but also, that this was none of the facts admitted to the pursuer's probation, or which he had even so much as alledged before the act and commission went out, and which stood entirely confined to a proof of the furnishings libelled: Neither did the pursuer himself depone to this fact, although the commissioner thought fit to take his own oath, as well as those of his servants.

The petitioner, therefore, apprehends, that what those two witnesses are said to have deponed, cannot be conclusive against him on this point; and ever since their depositions appeared, he has positively averred, that he never did lodge with *Anne Corbet* in the pursuer's house, and that, to his knowledge, he never so much as saw the pursuer, or any of his servants. He has also repeatedly offered to prove, that during all that time when he was at *London*, he lodged in the house of his own sister, and to bring other satisfying evidence, that the pursuer's two witnesses must have been mistaken, or their depositions erroneously taken down: He therefore humbly hopes, that if it shall appear necessary, your Lordships will still allow him an opportunity of clearing up this point, upon which the Lord Ordinary's interlocutors are expressly founded.

But to proceed:—After the petitioner had returned to *Glasgow*, and when *Richard Corbet* saw that there was no prospect of his sister's afterwards living with him, he appears to have bethought himself of throwing the burden of the debts she had contracted upon the petitioner, in case he could not prevail with him to remit an extravagant sum for her future support: With this view he seems to have put the pursuer *Mr. Donalson* upon the scheme of making a claim upon the petitioner; but finding that not likely to succeed, he wrote the petitioner another letter, of date the 13th of *February* 1766, being many months after the whole furnishings libelled were made. In this letter, which has been recovered and produced, *Mr. Corbet* is pleased to throw out many groundless and injurious reflections against the petitioner, and to pretend, that his sister was now willing to return, providing the petitioner would remit 100 *l. Sterling* for her use; and amongst other things, tending to justify her misconduct, (with what reason her behaviour in the sequel has shown), he uses these words:

"What

“ What was wrote to you by *Donaldson*, (who is a very trouble-
 “ some bad man), you must pay no regard to: *I have paid him*
 “ *his demand*, save a few weeks that he has no sort of right to be
 “ paid for.”

The petitioner submits it to your Lordships, whether from those letters, and other circumstances above mentioned, particularly *Corbet's* accepting the bill for 28 *l.* and afterwards refusing to pay it, without any pretence of insolvency, or proof of diligence done against him, there is not, upon the whole, sufficient grounds to conclude, that the pursuer in combination with Mr. *Corbet*, is endeavouring to load the petitioner with a debt that is already paid and extinguished, or for which the petitioner ought not to be made liable: At any rate, it seems clear, that the furnishings were made on the faith of *Corbet*, and not of the petitioner; and that as *Corbet* actually made payment of a part, and accepted a bill for 28 *l.* more, and after all, did, under his own hand, aver, that he had paid the whole that was due; so the pursuer who still holds *Corbet's* bill for the greater part of the balance, ought to be left to operate his payment from him, or the lady's present husband, and not from the petitioner.

The petitioner comes now to the *third* and last point proposed to be argued, namely, that supposing *Anne Corbet* to have been lawfully married to the petitioner; and that her brother had no ways interposed his credit for her, yet the petitioner ought not to be subjected, in respect of her desertion, and other circumstances of the case.

Where a husband and wife are living in family together, there is just ground for subjecting him for furnishings made to his wife, especially of a nature falling within her *præpositura*, so long as she is not inhibited. But the reason ceases, where a wife wrongfully deserts her husband, without any maltreatment on his part, and betakes herself to unlawful and irregular courses. This holds a *fortiori*, where the wife goes into a foreign country, and where the contractions are not such as are suited to a reasonable aliment, even were she intitled to it, which a wife could not be in the case of wilful and causeless desertion. And whatever equitable plea might be made in the case of moderate and reasonable furnishings, yet that cannot here be maintained, where the furnishings were, on the contrary, highly extravagant, consisting of room rent, at the rate of 52 *l. Sterling per annum*, wine, millinery goods, china,,

clina, &c. amounting within a short space to near thrice the petitioner's annual income. Could the petitioner be liable in these, he might by the same rule be totally ruined by this woman's contractions, without his knowledge or consent, or possibility of preventing them; and that, although it here appears from the payment he made to the pursuer himself, that she had the command of more money than was sufficient for her reasonable maintenance, during a much longer time than the currency of the accredits libelled.

This court has sustained the husband's defence in sundry similar cases; and in some, where the circumstances were not near so strong or favourable for him as the present.

Thus, in a case observed by *Haddington* in 1610, it was found, *Dei. Vol. I. p. 403.* that a husband is not liable for furnishings made to a wife, who lives a scandalous life apart from her husband. Again, in the case of *Allan* contra the Earl of *Southesk*, 6th July 1677, observed by *Stair*; the Earl of *Southesk* being pursued for payment of an accredit furnished to the countess at *London*, who had not totally deserted him, it was found, " If the Countess went to *London* without his approbation, or a just reason, that the Earl " was obliged for no more than would have been her expences, " had she staid at home, and that, *whether she was inhibited or not.*"

In the case of *Lady Kinsmans* against her husband, 19th July 1711, this court would not even subject the husband to the expence of the wife's journey to *Bath*, for recovery of her health, without his consent, beyond what was proved to be absolutely necessary, although she had no intention of deserting him altogether, and was advised by physicians to go there. Lord *Fountainhall* reports, that the Lords there found, " That where a man " is willing to aliment his wife, she cannot crave a separate aliment, unless she prove *severum* or maltreatment, and that she " cannot desert his family: yet if her sickness require it, and his " fortune can bear it, he is obliged to promote the cure, though " it be by going to the baths, or other medicinal waters: and " therefore sustained the proofs at her instance, against her husband, in so far as the money was *necessarily* advanced to her journey to *England.*"

And Lord *Erskine* lays down this rule, " If the wife deserts " the husband, without such sufficient cause of departure, he " may obtain a divorce against her upon malicious desertion, but " will

" *will by no means be liable to aliment her*, the wife being by all laws bound to cohabit with the husband.

According to these authorities, there is no necessity for the husband's using inhibition, to secure him against extravagant contractions made by the wife, after she has causelessly deserted him, and indeed in such a case as the present, it is plain, that an inhibition can be of no use. Where the wife leaves this country, and goes into foreign parts, the diligence executed here, cannot prove any interpellation to foreign creditors; and for the same reason they cannot be suffered to strengthen their claim upon the wife's contractions there, by pleading on the omission of that diligence here.

In such a situation, the husband cannot know where his wife is, far less the persons with whom she has contracted, or intends to contract in such foreign parts, or the method competent by the laws of that country, for interPELLING them from giving her credit. Neither does the petitioner know at this day, any form of the law of *England*, equivalent to an inhibition against a wife; nor has the pursuer pointed out any form of the kind legally authorised there. Indeed, if there had been such a form, he had no opportunity of using it before his going to *London* in *August 1765*. Before that time he could not give personal notice to the pursuer, to desist from making furnishings to this lady; nor does it appear, that he would have been in a better case, even as to his defence against posterior furnishings, had he done so; and as for the other tradesmen who have since assigned their claims to Mr. *Donaldson*, it is simply impossible, that he could give them any such notice, as he never saw nor heard of them, till they concurred with Mr. *Donaldson* in bringing this action against him.

May it therefore please your Lordships, to alter the Lord Ordinary's interlocutors above recited, and to assolvie the petitioner from this process simpliciter; or, at least, before answer, to allow the petitioner a proof of the facts above set forth, so far as not already instructed; particularly, with respect to the minority of Anne Corbet in the 1759, her marriage with Mr. Sandford, and the trial that thereupon ensued; and as to the place of the petitioner's residence while in London, in harvest 1765; and other facts and circumstances tending to show, that the furnishings libelled, were not made on the faith or credit of the petitioner.

According to justice, &c.

D A V. R A E.

A N S W E R S

F O R

JAMES DONALDSON Linen-draper in
London;

T O T H E

PETITION of JAMES FEA of *Clestrain*.

IN *February* 1765, the lady of this petitioner was introduced to the respondent by Mr. *Corbet* her brother, a gentleman of the law, by Mrs. *Waldie* sister to Mr. *Fea*, and Mrs. *Hamilton* his niece, and these persons were the constant visitants of Mrs. *Fea* while she staid at the respondent's house; she was represented to be the lady of a *Scots* squire, a gentleman of fortune, that she was come to *London* to visit her friends, and live for some time there; and that her husband was very soon to follow her; and upon enquiry at indifferent persons, the respondent was informed, that the petitioner Mr. *Fea* was a gentleman of considerable fortune in the north.

Mrs. *Fea* having thus taken an apartment in the respondent's house, she continued to lodge with him for about ten months, from the 25th of *February* 1765, to 5th *December* thereafter; and whatever aspersions her husband is now pleased to throw upon her character, the respondent shall for his part say, that during all the time she lived under his roof, she behaved like a woman of virtue and prudence, and her husband's sister and niece were her chief associates.

At this time she had a young child and a servant maid; she had occasion for many necessaries both for herself and child; she was even very poorly provided in linens, and in many other necessary
articles

articles of wearing apparel; all which the respondent had no scruple to trust her with, and to provide for her, as she really appeared an active managing woman, and as the respondent was advised by her and by all her friends above mentioned, that her husband intended shortly to come and reside at *London*, and which by a letter from *Richard Corbet* to Mr. *Fea* in process, appears actually to have been so intended at that time: Mr. *Donaldson* could not entertain the least suspicion but that he was dealing with persons of considerable station and character, and thus was induced to supply Mrs. *Fea* with such necessities as she stood in need of in his way, and some others of his neighbours in the same way also furnished her with different articles, the whole, including lodging for the space of ten months, amounting only to between 80 and 90 *l*.

And if the accounts were particularly considered, it is surprising that they were not a great deal more, for the lady had come from the *Orkneys* where she had been for some years with her husband, and was greatly in dishabille; she wanted linens of all sorts for herself and child, and other articles of wearing apparel; and beside the doctor's bill of between 4 and 5 *l*. sundry articles in the way of furniture to herself, were provided her, such as cups and saucers, china bowls, and some few silver spoons, sheets, &c.

That in *August* 1765, Mr. *Fea* himself came to *London* and lodged some time with his wife; and at this very time the respondent received a payment of 15 *l*. *Sterling*, as marked in his account, and never the least hint was given that Mrs. *Fea*'s staying in *London*, or the respondent's house, was not perfectly agreeable to her husband; on the contrary, he and all his friends seemed to approve of it, and matters went on without the least murmur till long after she had quitted her lodgings at the respondent's, and he and other honest creditors were making demands against Mr. *Fea* for their money.

Richard Corbet the brother of this lady, acted as agent for Mr. *Fea*, and often told the respondent that he would be very sure of his money, for that Mr. *Fea* was coming to *London* to live; and that he had in the mean time given Mr. *Corbet* a letter of credit upon a good man in *London*, from whom money would be drawn from time to time as wanted; but afterwards, when the respondent came to demand payment from Mr. *Corbet*, he was told that

Mr.

Mr. *Fea* had deceived him, for that he was not coming to *London*; and that he had imposed upon Mr. *Corbet* with a letter of credit, upon which he could not receive one penny.

This very circumstance is instructed by a letter from Mr. *Corbet*, which Mr. *Fea* has thought proper to produce, in the course of this process, an excerpt from which the respondent will take the liberty here to insert. This missive of this date, expresses surprise at Mr. *Fea's* silence and *unstable disposition*, informs him of the miserable situation of his wife, and that the stories he had heard of her were false and groundless, acquaints him, that the persons she was owing some debts to, were pressing for their money; and then adds, " But I see no prospect of any thing being done
Feb. 18. 1766.
" by you fairly, therefore the people say they will have recourse
" to sould means, which is shameful to think on; upon the whole,
" if you have a mind to secure to yourself any real happiness, I
" would recommend it to you immediately, on receipt hereof, to
" come here in person, or remit a good bill for upwards of 100 l. which
" will enable your wife to come to you in a decent manner, and
" put an end to the many scandalous sayings that are justly levelled at you, for so basely and inhumanely neglecting her: If
" something is not immediately done by you, the consequence
" must fall upon you; and if you conscientiously ask yourself the
" question, you must say, that you have treated her ungenerously and
" bad: For my own part, I am tired and sick of the affair, and
" would not have meddled in it, had I the least notion that you
" (at the time you made such faithful promises of your intention of
" coming to live here) intended nothing but to deceive me, and take
" me in: It was a thought foreign to my breast, that Mr. *Fea*
" would, or could act with such dissimulation and ungenerosity;
" but so it was. I would be glad to hear from you, by return of
" post what is your real intention; till then, will suspend my ultimate opinion, which, I hope, you may give reason to alter
" in your favours, and that you will send a good bill, in order to
" enable Mrs. *Fea* to go to you, she being now willing to go, or that
" you will come in person; but pray don't bring such a letter of credit
" as you did last, which deceived me."

As the respondent, and some others of his neighbours, who had provided Mrs. *Fea* in necessaries, were thus shifted off between Mr. *Fea* and Mr. *Corbet*. and had no prospect of getting their payment in a fair and easy way; they were obliged to bring

a process before this court, for payment of between 60 *l.* and 70 *l.* that was owing them; and they joined all in one process as pursuers. This Mr. *Fea* objected against, and pled a *no-process*, in regard there were no less than six different pursuers, and that none of their sums exceeded 12 *l. Sterling*, and so could not be insisted in before your Lordships: And the other sums, besides Mr. *Donaldson's*, being indeed only for 4 *l.* and 5 *l.* and some less, action was only sustained at Mr. *Donaldson's* instance; but dismissed with respect to the rest as incompetent.

Jan. 2. In order to save expences, the other creditors of Mr. and Mrs. *Fea* conveyed their debts to Mr. *Donaldson*; and he having raised a new summons, this was remitted to, and combined with, the former process, and a proof granted of the libels.

That proof was reported to the Lord Ordinary, by which every article pursued for is clearly instructed, except a tallow-chandler's account of about 17 *s.* anent which no proof was led, the creditors being out of town at the time when the proof was taken: so the import of the proof is not disputed: And it shall only here be observed upon it, that it is particularly proved by *James Pattison*, who lodged in Mr. *Donaldson's* house at the same time that Mrs. *Fea* lodged there, and by *Elizabeth Murray*, who was servant to Mrs. *Fea* during all that time, and not to Mr. *Donaldson*, as set forth in the petition, that Mr. *Fea* lodged with his wife in Mr. *Donaldson's* house in the month of *August* 1765; so that from the proof, and from the letters lately produced by Mr. *Fea* from Mr. *Corbet* to him, the fact clearly appears to be, that Mrs. *Fea's* going to *London* had been concerted between her and her husband, and a matter entirely agreeable to him; and that the plan settled upon, was, That Mr. *Fea* was very shortly to have come and resided close with his wife at *London*: That in *August* 1765 he had gone up to visit his wife, and to adjust matters: and, at that time, had furnished Mr. *Corbet* with a letter of credit to make the necessary supplies for her, and that *Corbet* had accordingly made kindly advances: but finding that he had been deceived by Mr. *Fea*, though the letter of credit not being paid, and that Mr. *Fea* had altered his resolution of coming to live at *London*, Mr. *Corbet*, who appears to be a sensible man, is loudly complaining of this, and of Mr. *Fea's* inhuman treatment of his wife; and *Corbet*, *pro se*, (as he expresses it) that Mr. *Fea* wanted only to deceive him and take him in, refused to make any further advances

ces for Mrs. *Fea*, or even to pay the respondent's draught upon him for 28 l. which he had accepted by his initials ; and his reasons were, that he only accepted as agent for Mr. *Fea* ; and that as he had failed in his remittances to Mr. *Corbet*, Mrs. *Fea*'s creditors might make their demand against her husband.

It is unnecessary to trouble your Lordships with all the proceedings before the Lord Ordinary. It may only be observed, that after mutual memorials, and four different representations on the part of Mr. *Fea*, the cause is now brought before the court by a reclaiming petition ; and it may be said for Mr. *Fea*, that he has omitted nothing that could tend to protract the cause, or create expence ; but he has not been altogether uniform in his plea, for after he was beat out of his objections to his dilatory defences, his next plea was, that his wife had deserted him, and therefore he was not liable : But unluckily for him, by the two witnesses above mentioned, and by the letters from Mr. *Corbet*, which he himself has been so kind as to furnish us with, it appears clear to a demonstration, that there was no desertion in the case on the part of Mrs. *Fea*, for that she and her child had gone there by his special permission, and that he was soon to go and reside there himself ; and that he had accordingly been at *London* for some time, along with his wife, and was to return, and had furnished her brother with some letters of credit, to supply her with what was necessary in the mean time ; but as this credit had not been good ; and as Mr. *Fea* had altered his resolution, instead of his wife deserting him, it is evident that he deserted her : He did not go to *London* to live with her as he had engaged, nor would remit her one shilling to pay her debts, and bring her down to *Scotland*, although Mr. *Corbet*'s letter above mentioned, shows she was willing and ready to come and live with him.

His next plea was a flat denial of his marriage : But that he had picked up this woman when he was a soldier in *Ireland*, and lived with her in *Scotland*, till she had eloped and went to *London*. Upon which the respondent being informed, that they were actually married in the parish church of *St. Clement*, in the county of *Middlesex*, in presence of the fore said Mr. *Corbet*, brother to the lady, and others, the respondent applied and got a certificate of this under the hand of the proper officer, the curate of the parish, bearing, that *James Fea* and *Anne Corbet* were married in that parish church upon the 21st *June* 1759.

Upon the production of this certificate, Mr. *Fea* was again obliged to change his ground, and to become married: But then he produced a letter from one *James Cooper*, dated 21st *October* 1766, bearing, that Mrs. *Fea* was married to another gentleman in *May* then last; and he adds, "I am told that *she intends* to *swear* that she was under adge when she was married to you; but she give it out that you was dead, but, in my opinion, you had better be silent, till such time as you hear order; and if you came offst her in *swearing* her *selfe* under adg at that time, so much the better for you."

Upon this Mr. *Fea* then founded his plea upon the *English* marriage act in the 1753, upon account of Mrs. *Fea* being under age when they were married in the 1759; and it not appearing that either parents or guardians had consented thereto, the marriage, therefore, was absolutely void and null, and consequently Mr. *Fea* was not liable for any of her debts, or necessary furnishings made to her.

The Lord Ordinary having repelled all his defences, they are now stated to your Lordships in this petition; and which, from the above narrative of facts, and the *media* upon which the Lord Ordinary's interlocutors proceed, it is humbly apprehended your Lordships will be satisfied, that the whole defences are destitute of every colour of law and justice; and that Mr. *Fea's* conduct hath been very improper in this matter; and, therefore, the respondent shall not spend many words in answering the petitioner's arguments, which seem all to be already obviated.

In the 1st place, It is contended by the petitioner, that by the law of *England*, there was no effectual marriage between him and *Anna Corbet*, and therefore he could not be subjected to the furnishings made to her.

Had the respondent the least fear, that either this, or any other of the grounds upon which the petitioner founds his plea, could afford him a legal and valid defence; the respondent would submit it to your Lordships, if Mr. *Fea* ought not, before being allowed the benefit of any such defence, be obliged to pay all the preceding expence: For each of the defences now founded upon, resolve into a total defence against the ground of action altogether, and which Mr. *Fea* has very artfully managed, and brought them out one by one before the Lord Ordinary; where-

as, they ought to have been proponed *in initio litis*, and before the respondent was put to the expence of extracting an act and commission, and of leading a proof to instruct the furnishings made, because this was altogether unnecessary, if any one of the defences now proponed was relevant, and could be sustained. For the defender, Mr. *Fea*, by his acquiescence in that interlocutor allowing the proof, and without proponing the defences that are now offered to the court, joined issue with the respondent, and in a manner obliged himself to stand or fall by that proof; at least, it is no more than strictly just, that before he could be allowed to avail himself of defences, which strike at the very foundation of the cause, that he should be obliged fully to indemnify the pursuer of all the preceeding expences.

But this is only mentioned to shew your Lordships the spirit of this petitioner, and the manner in which he hath conducted his defence: For the respondent cannot, with submission, observe or imagine, that there is any thing in the least solid in all the defences proponed for the petitioner, or that the court will see any cause for altering the interlocutors of the Lord Ordinary.

For as to this marriage not being effectual by the law of *England*, though the facts were even admitted, which the respondent knows nothing about, it is apprehended this case would not at all fall under the marriage act, nor has the *English* law any thing to do with the question; the act in the 1753 only extended to natives of *England*, at least to one or other of them being such, but was never meant nor could affect the marriage of a *Scots* gentleman and an *Irish* lady, if they chused to be married in *England*, according to a form valid and effectual by the laws of their own country.

But of this, as well as every other fact upon which the arguments in this petition are founded, your Lordships have not the least shadow of evidence, unless you were to admit as such, the missive of this *James Cooper*; and even according to his account it does not appear, that the lady would, in any view, fall under the marriage act, as being under 21 years of age, when she was married, unless Mr. *Fea* can improve the advice given by Mr. *Cooper*, and “assist her in swearing herself under age at that time.”

But, supposing that a marriage, after some years cohabitation of the parties, is upon the statute of *England* declared void and null

null from the beginning, will it be pleaded from any principle of equity, or from any rules deduced from the laws of any country, that this *act* could be extended any further than in so far as respected the interest of the married persons; for, surely, third parties, *bona fide* contracting with them, could not be any ways hurt or prejudiced; or, as in this case, where the respondent supported the petitioner's wife and child for 10 months, and provided them in necessaries, though the husband and wife should now incline to be free of one another. No lawyer will plead before this court that this would have any effect as to by-gones, or that this illicit and fraudulent act of the married parties, could hurt others who had no concern in the matter.

In the *second* place, it is pleaded for the petitioner, that it was not upon his faith and credit that the lodgings were set and furnishings made to Mrs. *Fee*, but solely upon her own credit, or that of her brother Mr. *Corbet*.

The respondent hath already told your Lordships how this fact stands, that Mrs. *Fee* was introduced to the respondent's house, by her own brother, and by a sister and niece of Mr. *Fee*'s; that she was reputed to be the lady of a gentleman of considerable fortune in the north of *Scotland*; and they all said, that Mr. *Corbet*, as the agent of her husband, would pay her bills, and answer for every thing that she should have occasion to use, and for some time the respondent got money from Mrs. *Fee* herself, and afterwards, upon a settlement with her, got a draught upon Mr. *Corbet* for 25 *l.* for it was no doubt indifferent to the respondent, from what hand he received his payment; but he considered Mr. *Fee* as the author of the whole, and that he was liable for all; and accordingly, when *Corbet* refused to pay Mr. *Fee*'s draught, as not having got remittances from Mr. *Fee*, Mr. *Densilope* made his demand against him for the whole sum owing him; for the respondent can honestly declare, that if it had not been on the faith of Mr. *Fee*, he would have had no dealings with the other parties.

But the respondent humbly apprehends, that though any person should furnish a man's wife and child in necessaries upon the credit of another, or even though the furnisher should not know their relation, yet if the furnisher should not be paid by the person on whose credit he engaged, that it would be competent upon an after discovery of the husband and parent, to demand payment from him; because every husband, and every parent, is

by the law of nature, and the law of every civilized country in the world, bound to aliment and provide in necessaries suitable to his station, his wife and children; and in this case, he can sustain no loss through this payment to the furnisher, because he would have been liable for the same debt to the person that gave the credit, and to indemnify him, had the payment been made by him.

In the 3^d place, the petitioner contends, that he ought not to be subjected for these furnishings to Mrs. *Fea*, in respect she deserted him, and from other peculiar circumstances attending the case.

From the facts which the respondent hath set forth to the court, this story of the desertion must appear a mere pretence; and if there is any such desertion, it is altogether on the other side: For from every circumstance of the case, and particularly from Mr. *Corbet's* letter above recited, which Mr. *Fea* has been kind enough to produce, it must appear evident to the court and to all mankind, that Mrs. *Fea's* going to *London* with her child had been a matter altogether agreeable to her husband, and that the scheme then and for some time afterwards, was, that he was to go and reside there himself: That he had given Mr. *Corbet* a letter of credit when he was up in harvest 1765, so as Mr. *Corbet* might be enabled to discharge Mrs. *Fea's* bills, and provide her in necessaries; and this letter of credit not being good, and Mr. *Fea* not coming to reside, as was intended, Mr. *Corbet* complains, that by this means he had been deceived by Mr. *Fea* and taken in; but as Mr. *Fea* had altered his intention of coming to reside at *London*, your Lordships see, that Mr. *Corbet* expressly tells him, that his wife is *willing to go and reside with him in the Orkneys*; but that he must come for her, or remit 100 *l.* to discharge the debt she had incurred. Mr. *Corbet* also in this letter complains, that Mr. *Fea* had basely and inhumanely neglected his wife, and that he had treated her ungenerously and bad; it is believed Mr. *Fea* will not pretend to say, that after this letter he either went to *London* himself to bring home his wife, or made the necessary remittance to her for that purpose. Where then was the desertion, or who was the deserter? This unfortunate lady with her child, appears to have gone to *London*, in the view that her husband should, after having settled his affairs in *Scotland*, come and reside there, but he afterwards leaves her to starve,

will not advance a penny for her support, will not bring her home again; nor will remit one shilling for that purpose; and though when in this dismal situation, abandoned by her husband, no friend able to support her, and debts contracted which she could not pay, she should, as averred by Mr. *Fea*, marry another gentleman, who bestowed upon her a good settlement, the respondent will be pardoned for saying, that she seems only to have yielded to the supreme law of necessity.

Thus standing the fact, the respondent has no occasion to examine the law and the decisions mentioned by the petitioner upon this branch of his argument; so the respondent will only further observe, that he, *optima fide*, let his lodgings, and made the furnishings to Mrs. *Fea* that he did: He had not the least reason to suspect but that there was the greatest peace and harmony between Mr. and Mrs. *Fea*; and which the respondent faithfully believes, was the case, till some months after she had left the respondent's house; and when Mr. *Fea* had altered his intention of going to *London*, and would neither go for his wife, nor make the proper remittances to bring her home. While she lodged under the respondent's roof, she lived in the greatest friendship, and was daily visited by Mr. *Fea*'s nearest connections: He came there himself, as your Lordships see, in harvest 1765, according to the deposition of two unexceptionable witnesses, and staid with his wife for some time: He knew well her situation; and that she and his own child, beloved to be furnished with necessaries, and that the respondent and some other honest tradesmen were in use to supply her; yet Mr. *Fea* will not pretend to say, that he ever dropped the least hint to the respondent, or any person living, that his wife was lodging there contrary to his inclinations, or that she was furnished with any one article that was not necessary for her, and suitable to his circumstances.

By the laws of this country, if a wife is profuse, or deserts her husband, we have the diligence of inhibition, which secures him against all her contractions; and the respondent apprehends, that this would even extend against *English* creditors contracting with a married woman from *Scotland*; at least the respondent is advised, that an advertisement in the *English* news papers is all that is required in that country to put all the lieges upon their guard; but indeed no such thing appears to have been necessary,

or

or at all in view in this case ; because it is evident, the lady had come to *London* with her husband's consent : She was daily visited by his nearest friends, and even by himself, who appears to have formed a plan, at least to have given it so out, that he was coming to stay altogether with his wife at *London* in a short time. Could the petitioner, in these circumstances, entertain the least doubt, that he was not acting properly ? and when all his transactions and furnishings to Mrs. *Fea* was privy and well known to Mr. *Fea* himself, the respondent apprehends he might have expected a more suitable return.

Upon the whole, it will be observed by the court, that the respondent, and other trades people, who had dealings with this lady, through the confidence and hospitality of honest *Englishmen*, have been involved in a question at law with the petitioner for the payment of their just debts ; and though they should succeed in the issue, which, with submission, they cannot doubt, yet by the expence incurred, through the methods by which Mr. *Fea* has conducted his defence, the respondent and his constituents will have very little, if any thing, into pocket at the long run. The Lord Ordinary did not allow further expences than the extracting the decret ; and his Lordship seemed to be moved to refuse full expences, through the great clamour made by Mr. *Fea* of the desertion of his wife, and his unhappy circumstances on that account ; but your Lordships truly see how this fact stands ; and whatever might be the case between the husband and the wife, the respondent had no call to be such a considerable sufferer by them, who was neither art nor part in their fault ; and therefore, it is humbly hoped, your Lordships will not only adhere to the Lord Ordinary's interlocutor, but will award expences, so far as is competent in this matter.

In respect whereof, &c.

DAV. ARMSTRONG.

DECEMBER 7, 1768.

Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N
O F
J A M E S F E A of C L E S T R A I N,

Humbly sheweth,

THAT the Petitioner, after having been many Years an Officer of the Army, was reduced, at the general Reduction of the Forces, after the late Peace, when holding the Rank of a Lieutenant. About the same Time the Petitioner succeeded as Heir-male to the Lands of *Clestrain* in *Orkney*; but his Predecessor, besides executing sundry Deeds in favours of his Sisters, left his Property burdened with a great Load of Debt, by which means the Petitioner has hitherto drawn nothing from this Succession.

It was the Petitioner's Misfortune, before he left the Army, and while stationed in *Ireland*, to contract an Intimacy with a young Woman, of the Name of *Corbet*, then residing in that Kingdom, a Circumstance the most unlucky that could have happened to the Petitioner, and which in the Sequel brought upon him great Misery, and involved him in the deepest Distress.

This Lady, who assumed the Name of the Petitioner's Wife, bore him a Child at *Limerick* in *Ireland*, in anno 1762, which was taken care of by the Lady's Mother, who lives in that Kingdom, and with whom this Child still remains.

That the Petitioner, having carried this Lady with him to *Scotland*, they arrived in the *Orkneys* in the End of *April* 1764; but the Petitioner's Circumstances not suiting the gay and enterprising

A

Disposition

Disposition of this Lady; and the *Orkney*, where she was under the Eye of the Petitioner's Friends and Relations, not being a Place where she had an Opportunity of following her own Courses, or of carrying on her Intrigues, she therefore was resolved to take the first Opportunity of making her Escape to other Parts, where she might live in a Manner more suitable to her own Taste. With this View she topped her self with considerable Sums of Money, which she artfully and industriously borrowed, in the Petitioner's Name, from different People in the *Orkneys*, unknown to the Petitioner: she likewise got her Hands on a Gold Watch of the Petitioner's, and had her Cloaths and other things belonging to her carried privately out of the Petitioner's House.

Being thus equipped, she found means, on the 22d July 1764, to get on board his Majesty's Cutter, the *Alarm*, then lying in *Kirkwall Road*, having previously concerted her Escape with Captain *Condon*, the Commander of the Vessel, who was bound for *Ireland*, but who was to stop for some Weeks in the Highlands of *Scotland* in his Way thither. After a tedious Passage, this Lady arrived with her Captain at *Dunvegan-bay*, where the riotous and extravagant Life she led, enabled her to get quit of a good Part of the Money she had brought with her from *Orkney*.

After the Captain of the Cutter had staid the Time he intended in the Highlands, he again set sail with his fair Passenger for *Belfast in Ireland*: and, soon after his Arrival there, the Lady left him, to wait on her Mother, who resides in *Aungate-street* in that City; but her Mother, who was well acquainted with her former Conduct, absolutely refused to see her, and would not so much as allow her to see her own Child.—Of this the Petitioner had Information by his Servant *Thomas Greig*, now a Vintner in *Kirkwall*, whom the Petitioner sent after the Lady to *Ireland*, to endeavour to persuade her to return to *Orkney*.

Upon her Mother's refusing to see her, this Lady took Lodgings near to where her Mother lived, where, according to the Petitioner's Information, she lived an infamous and abandoned Life, until her Money was mostly exhausted, and also the Value of most of her Cloaths, and Gold Watch, which she there sold; she then went on board the common Packet, from *Dublin* to *Parkgate*, and from thence to *London*, in Company, and at the Expence, of a reduced

duced Captain on the *Irish* Establishment, with whom she lived a considerable Time in Country Lodgings near *London*.

Being likewise discarded by this Captain, she applied to *Richard Corbet*, her Brother, an Attorney in *London*, who endeavoured to procure her Lodgings, at the House of Mr. *James Cooper*, No. 3. of *Cecil-street*, in the *Strand*, and in which House she had formerly lived with the Petitioner; but Mr. *Cooper* being well acquainted with her infamous Conduct, refused to admit her into his House, or to have any Connexion with her.

Upon being refused Admittance here, her Brother conducted her to another House in the same Street, where he obtained Lodgings for her; there she remained for a few Weeks, but her Conduct with the Gentlemen from whom she procured Visits, proving offensive to the House, her Landlord, it is informed, beat her, and turned her out of Doors.

Upon this, her Brother again took Lodgings for her at the House of *James Donaldson* Linen-draper in *London*, at the Rate of no less than 20 *s.* per Week, for which Rent her Brother became bound to the Landlord, as the Petitioner is informed. In this House she was furnished with a Variety of Goods, within the Space of a few Months, to the Amount, in whole, of above 90 *l. Sterling*, whereof, after sundry partial Payments, there is said to be still remaining due 47 *l.* 13 *s.* 10 *d.* and not satisfied with these extravagant Furnishings, it is said Mr. *Donaldson* recommended this Lady to other Tradesmen of his Acquaintance, who furnished her with different Articles during the same Period, to the Extent of about 20 *l.* more, and, for ought the Petitioner knows, she may have contracted other Debts exceeding all the Petitioner is worth in the World.

Mr. *Donaldson*, as shall be afterwards shown, knew nothing about the Petitioner, or of this Woman's Connexion with him, far less had he any Authority from the Petitioner to give Credit to this Lady; on the contrary, he considered the Lady herself as his Debtor, took partial Payments from her, and took her Draughts on her Brother for more. In this Situation, the Petitioner was not a little surprized and alarmed, when he was conveyed in an Action before this Court, at the Instance of Mr. *Donaldson*, for himself, and five of his Friends, concluding, that the Petitioner should be decreed to pay certain Accounts of Furnishings made to this Lady when living in *London*.

This

This Process came in court before the Lord Kennet, Ordinary, who allowed a Proof of the Furnishings ; which Proof was accordingly taken by the Pursuer, upon Commission, at *London, ex parte* of the Petitioner, and Memorials being given in for the Parties, the Lord Ordinary, on advising the same, of this Date, pronounced the following Interlocutor : “ The Lord Ordinary having considered this Memorial for the Pursuer, with the Counter-memorial for the Defender, and Proof adduced for the Pursuer, and, particularly, having considered, that it is not alleged by the Pursuer, and is not denied by the Defender, and is swore to by one of the Witnesses, *James Patterson*, that the Defender lodged along with his Wife in the Pursuer’s House, in *August 1765* ; and that it is not alleged that he gave any Intimation to the said Pursuer, or to the other Persons who have indorsed their Accounts to him, not to give Credit to his Wife, repels the Defence pleaded for the Defender ; finds the Furnishings sufficiently intrusted, except the Article of *17 s. 11 d. Sterling*, for Candles ; and therefore decrees against the Defender for Payment of the whole Sums libelled, except the said Sum of *17 s. 11 d. Sterling* ; but, before Extract, ordains the Pursuer to produce *Mrs. Todd’s* Draught on *Mr. Collett* for *28 l. Sterling*.”

The Petitioner gave in a Representation against this Interlocutor, and the Lord Ordinary, upon advising the same, with Answers, of this Date, pronounced the following Interlocutor : “ The Lord Ordinary having considered this Representation with the Answers thereto, refuses the Desire of the said Representation, and adheres to the former Interlocutor, with this Variation, *it is denied by the Defender*, that he lodged in the Pursuer’s House along with the Defender’s Wife, but which is not material for obtaining an Alteration of the former Decree, as it is in Trost by two Witnesses, that he did lodge in said House with her in *August 1765* ; and, in respect that the Draught upon *Robert Collett* is now produced, allows the Decree formerly pronounced to be extracted.”—A Representation was offered for the Pursuer, craving the Pursuers might be appointed to confess or deny certain Facts material to the Issue, and if denied, that the Petitioner might be allowed a Proof of them. Answers were likewise put in to this Representation, with which was produced a Proved on *Richard Collett’s* Bill, and also a Certificate said to relate to the

July 16,
1767.

November 17,
1767.

the Petitioner's Marriage ; and the Lord Ordinary having advised the same, of this Date, refused the Desire of the Representation.

February 2,
1768.

Some further Information having been transmitted about this Time by the Petitioner to his Agent, and, amongst therewith, some Letters respecting this Matter, which the Petitioner had accidentally preserved, these were given in with another Representation, and Answers having likewise been put in thereto, the Lord Ordinary, at a Calling of this Date, when the Pursuer moved for Ex-pences, was pleased to pronounce the following Interlocutor: June 25,
1768.

" Having considered this Representation, with the Answers thereto, and what is above set forth, refuses the Desire of the Representation, and adheres to the former Interlocutor ; and upon the Defender's making Payment to the Pursuer, of the Sum of 2 s. 6 d. being the Expence of protesting the above mentioned Bill, ordains the Pursuer to deliver up the said Bill and Protest, with an Assignment thereto, to the Defender : Finds the Defender liable in the Expence of extracting the Decreet, as the same shall be liquidate by the Collector's Receipt, but finds no other Expences due, and decerns." But as, in writing out this last Interlocutor, an Omission had happened with respect to the Form of the Assignment of *Richard Corbat's* Bill, which the Lord Ordinary had ordered to be granted to the Petitioner ; this Mistake was mentioned in a short Representation, which produced a Calling of the Cause, of this Date, when the Lord Ordinary pronounced the following Interlocutor: July 13,
1768. " Having considered this Representation, and heard Parties Procurators thereon, finds that the Pursuer must grant an Assignment to the Bill, with Warrandice from Fact and Deed, and refuses the Desire of the Representation as to the other Points.

These Interlocutors of the Lord Ordinary were submitted to your Lordships Review, in a Petition for the Defender, which was appointed to be answered ; and after the Answers came in, your Lordships were pleased, of this Date, to pronounce the following Interlocutor: Nov. 26,
1768. " The Lords having advised this Petition, with the Answers thereto, they refuse the Desire of the Petition, and adhere to the Interlocutors of the Lord Ordinary reclaimed against."

The Petitioner must crave your Lordships Forgiveness, for once more submitting this Cause to your Consideration ; for, if the Petitioner shall be found liable for the Contractions of this Lady,

the Consequences will strike pretty deep in Point of Precedent, and cannot avoid bringing the Petitioner himself to immediate Ruin, as, for ought he knows, her Debts may already exceed all the Petitioner is worth in the World, and, however that Matter may be, her former Conduct has shown, that, by her extravagant Manner of living, she can easily, within the Space of a few Months, spend more than the Value of the remaining Wrecks of the Petitioner's Fortune. Your Lordships have already heard of her wandering through all the three Kingdoms, gratifying her Taste for Extravagance and Luxury, and contracting Debts in a foreign Country, to which he had no Accession, and which it was not in his Power to prevent, and, for ought the Petitioner knows, she may still be going on in the same Course. These Circumstances will surely have Weight with your Lordships, in considering the Petitioner's other Defences against this Claim.

In bringing your Lordships Judgment under Review, the Petitioner cannot help regretting, that some Facts now stated, were not laid before your Lordships in his former Petition, his Doer here, waited until the Reclaiming Days were almost elapsed, expecting further Information, which, after all, did not come in Time, owing to the Petitioner's remote Situation, and the precarious and uncertain Communication betwixt this and the *Orkneys*. In these Circumstances, his Counsel was cautious in offering to prove Facts, without having certain Information from his Client, how these Facts stood, and the Proof that could be brought of them : But now, after receiving full Information, the Petitioner shall state such Facts, as he apprehends are sufficient to support his Defence, and of these he shall bring direct Proof, if they are controverted.

The principal Grounds upon which the Pursuer has endeavoured to subject the Petitioner, were these, That the Petitioner, being married to this Woman, is liable for her Debts ; that the Pursuer and his Cedents made the Furnishings libelled, on the Faith of the Petitioner's being liable for the same, as she then took the Name of *Mrs. Lea*, and that the Petitioner did no ways interpel them from giving such Credit, but, on the contrary, did lodge some Time amongst with her as his Wife, in the Pursuer's House.

These Grounds shall, in the Sequel, be controverted ; and the Petitioner will endeavour to show, that there was no subsisting or effectual Marriage betwixt him and this Woman, such as, by the

Law of *England*, where the Marriage is said to have happened, and where the Furnishings were made, could have subjected him for the same: That it was not upon the Petitioner's Faith or Credit, as the Husband of this Woman, but on her own Credit, or that of her Brother, that those Furnishings were made, and from whom Payment ought to be recovered, if still due: That, supposing this Woman to have been lawfully married to the Petitioner, and the Furnishings made on the Belief thereof, yet that the Petitioner, in respect of her Conduct, could not be liable, even for an Alimment to her, far less for such extravagant Contractions as are now claimed.

Your Lordships will observe, that the Connection between this Woman and the Petitioner is agreed to have begun in a foreign Country, and their pretended Marriage is said to have happened in *England*; by the Laws of which Country its Validity falls to be determined, especially in this Question with the Pursuer, an *English* Creditor. The Petitioner does not deny that he did, for some Time, cohabit with her in this Country, and suffer her to take his Name; but that is not sufficient, in the Law of *England*, to constitute an effectual Marriage.

The Pursuer seems to have been sensible of this, and has produced a Certificate, dated 14th *December* 1767, signed *Isaiah Jones*, Curate, bearing, " That *James Fea*, of this Parish, (*St. Clement-Danes*) Batchelor, and *Anne Corbet* of this Parish, Spinster, " were married in this Church, by Licence, this 21st Day of *June* " 1759, in the Presence of *Richard Corbet* and *Robert Johnston*." But the Petitioner does, with Submission, contend, that this Certificate, half-printed, half-wrote, cannot be sustained as probative or legal Evidence of the Petitioner's Marriage.

For your Lordships will observe, that even the Names of the Parties are not the same: The Name of the Man said to have been then married, is, indeed, as the Petitioner's, *James Fea*, but the Name of the Woman is quite different; for the Name of the Woman mentioned in this Certificate is *Anne Corbet*, but the Woman who lodged in the Pursuer's House subscribes her Name *H. Jane Fea*, as appears by her Subscription at the Bill drawn by her upon her Brother *Richard Corbet*, in Process. That she should change her Surname from *Corbet* to *Fea*, immediately upon her assuming the Character of the Petitioner's Wife, was not at all extraordinary, on the contrary, it is usually done; but that she should, at that Period,

Period, change her Christian Name, appears truly singular. Besides, in the above Certificate, there are no Designations given to either of the Parties then said to have been married, such as can distinguish them with Certainty, or such as might not apply to any other Persons of the same Names.

And, further, supposing, for once, this Certificate to apply, and to prove the actual Celebration of a Marriage, yet such Marriage must have been absolutely void and null, as the Woman who lived with the Petitioner was, in the Year 1759, under Age, and no Consent was given by Parents or Guardians.

26th Geo. II.

Chap. 56.

The *English* Marriage-act declares, " That all Marriages, solemnized by Licence after the said 25th Day of *March* 1754, where either of the Parties, not being a Widower or Widow, shall be under the Age of twenty-one Years, which shall be had without the Consent of the Father of such of the Parties so under Age (if then living) first had and obtained, or, (if dead) of the Guardian or Guardians of the Person of the Party so under Age, lawfully appointed, or one of them; and, in case there shall be no such Guardian or Guardians, then of the Mother (if living, and unmarried); or, if there shall be no Mother living and unmarried, then of a Guardian or Guardians of the Person appointed by the Court of Chancery, *shall be absolutely null and void*, to all Intents and Purposes whatever." The Statute likewise specifies the Form of the Entry in the Parish-registers; and, where either of the Parties are under Age, specially requires the Consent of the Parents or Guardians to be therein ingrossed, which the Certificate here produced does not contain; and, therefore, supposing that it did apply to the Parties, yet, on account of this Woman's Minority and Want of Consent, the Marriage itself must have been void and null.

The Answer to this Argument urged for the Defender, was, that this Case did not fall under the Marriage-act, for, that the Act above quoted extended only to Natives of *England*, and could not affect the Marriage of a *Scots* Gentleman and an *Irish* Lady, if they chose to be married in *England*.

But this Answer will not do; for there are but two Exceptions in the above Act of Parliament, neither of which applies. The first is in these Words: " Provided always, that this Act, or any thing therein contained, shall not extend to the Marriages of any of the Royal Family:" And the other Exception is,

" Provided

“ Provided always, that nothing in this Act contained shall extend to that Part of *Great Britain*, called *Scotland*, nor to any Marriages amongst the People called *Quakers*, or amongst the Persons professing the *Jewish* Religion, respectively, nor to any Marriages solemnized beyond the Seas.” It is evident, therefore, that the Law so stands, as to affect every Marriage celebrate within the Kingdom of *England*, to whatever Nation the Parties belong; for, if the Law affected only *English* Men and Women, it would bind them, where-ever their Marriage was celebrate, whether in or out of *England* (if not beyond Seas) the contrary of which daily Practice shows. And, in fact, this Woman is a Native of *England*, her Father was a Residenter in *Liverpool*, where she was born, and she was only gone over to *Ireland*, to reside some Time with her Mother there.

In this view, did this Woman herself consider the Matter; for, after having deserted the Petitioner, made her Excursion to the *Highlands, Ireland*; and, lastly, to *London*. She was actually married in that City in *May 1766*, at *St. Anne's Church, Soho*, to a Gentleman of the Name of *Sandford*, of considerable Fortune, and Son to a dignified Clergyman of the Church of *England*. Of this Fact she herself acquainted the Petitioner by Letter, in which she said, she desired the Petitioner to show, that he ever had any Right to her. *Richard Corbet*, her Brother, likewise wrote to the Petitioner to that Purpose, although unluckily the Petitioner destroyed these Letters upon receiving them, not thinking that they would have been necessary for his Defence against this Claim.

The Pursuer has not ventured expressly to contradict this Fact; on the contrary, in the Answers to the last Petition, the Pursuer endeavours to apologize for her Conduct in this Respect. His Words are: “ And though, when in this dismal Situation, abandoned by her Husband, no Friend able to support her, and Debts contracted, which she could not pay, she should, as averred by Mr. *Fea*, marry another Gentleman, who bestowed upon her a good Settlement, the Respondent will be pardoned for saying, that she seems only to have yielded to the supreme Law of Necessity.”

But the Fact does not rest here, the Petitioner wrote a Letter to his old Landlord, Mr. *Cooper*, for further Information on this Subject, and Mr. *Cooper's* Answer in Process contains the following Passage: “ You may take this for granted, that she was married in *May* last at *St. Anne's Church*, and her Brother was employed

21 October,
1766.

“ as a strange Lawyer, to draw the Writings, to settle on her
 “ 3000*l.* he did not give her away, as you said, but was intro-
 “ duced as her Brother some Time after ; he is a Man of Fortune
 “ and Family, and they are already parted. He was certainly ar-
 “ rested for her Debts, but he gave Bail, and there will be a
 “ Trial soon ; and I am told, that she intends to swear, that he
 “ was under Age when she was married to you.” Nay, this
 Marriage of hers with Mr. *Sandford*, appears upon Record, and a
 Certificate thereof has been extracted, and duly attested ; but the
 Petitioner’s Friend, whom he employed in *London*, in place of
 transmitting this Certificate to the Petitioner’s Agent here, which
 would have been the proper Way, sent it in a Letter addressed to the
 Petitioner in the *Orkneys*, and where it has been wrote for, and
 from whence it is daily expected.

The Petitioner is likewise informed, that his Correspondent, Mr. *Cosper*, was not wrong in his Conjecture, for that a Trial did actually proceed, as to the Validity of this Lady’s Marriage with Mr. *Sandford*, and that she prevailed in that Trial, whereby any Marriage between her and the Petitioner was proved to be null and void ; and that, in consequence thereof, the Pursuer, among others, (though he now denies it), actually made a Claim upon Mr. *Sandford*, and that that Gentleman paid some of her Debts.

So standing these Facts, the Petitioner cannot be considered as the lawful Husband of this Woman, and so the Foundation of the Pursuer’s Action falls ; and even, though, in our Law, a Man’s cohabiting with a Woman, and allowing her to take the Name of his Wife, might subject him for suitable Furnishings to her, this will not aid the Pursuer : his Claim falls to be tried by the Law of *England*, where the Furnishings were made, and where the Marriage is said to have happened ; and the Petitioner is advised, that, by the Law of that Country, nothing less than a valid and effectual Marriage, proved and acknowledged, or the Man’s express Engagement to pay for such Furnishings to the Woman, can make him liable ; and even, supposing that the Law had stood otherways in *England*, and that a Woman’s being reputed the Wife of a Man, though not truly such, joined with the Furnishings being made on the Credit of the supposed Husband, on the Faith of his being liable for the same, could be sufficient to subject him ; the Rule would not apply here, as the Furnishings in question were not
 made

made upon any such Faith or Belief, but upon the Credit of the Lady herself, or her Brother.

When this Woman went to *London*, it is not pretended, that the Petitioner accompanied her, or that the Pursuer knew any thing about him, or had ever seen his Face. By her own Story, the Petitioner was then in *Orkney*, at the Distance of 700 Miles; and it can hardly be presumed, that Persons who were utter Strangers to him and her, would make those Furnishings to her in *London*, upon the Faith of being paid by the Petitioner, without any Mandate or Authority from him; especially when it is considered, that it daily happens in *London*, that Women of this Lady's Stamp assume to themselves Husbands, Characters, and even Dignities, when the whole is Fiction, with a view only to impose upon the Belief of those they deal with. But an Imposition of this Kind would not have easily gone down with this Pursuer, who is no Novice, as it appears from the Proof, he has long been in the Practice of setting Lodgings. The Story of his believing this Woman to be the Lady of a great Squire in the North of *Scotland*, does not tell well. This was a Bait that one of Mr. *Donaldson's* Experience would not have swallowed. The *Scotch* North-country Squires do not want their Share of Vanity, and Mr. *Donaldson* could hardly suppose one of these would allow his Wife to come wandering into *London*, like a knotless Thread, without a Servant or Attendant of any Kind. But the real Fact is, that Mr. *Donaldson* trusted only to the Credit of the Woman herself, or, more properly, of her Brother *Richard Corbet*, an Attorney and Residenter in *London*, on whom Mr. *Donaldson* could lay his Hand any Day of the Year.

Your Lordships have already been informed of Facts which strongly corroborate this Argument. Thus, Mr. *Corbet* applies for Lodgings for his Sister, at Mr. *Cooper's* in *Cecil-street*; there her former Character meets her, and she is rejected: He carries her to another House in the same Street, where he obtains a Lodging for her; and, it is believed, after she was dismissed from that House, her Brother paid the Bills.—That Mr. *Corbet* likewise became bound to clear Mr. *Donaldson's* Bill can hardly be doubted, and that he would have also paid it, there is as little Doubt, if he had not afterwards, in Conjunction with his Friend Mr. *Donaldson*, thought of the Scheme of subjecting the Petitioner; and that is the real secret Spring in this Cause; for it appears from Mr.

Donaldson's

Donaldson's Accounts, that he received in *March* 1765, 4 *l.* in *June*, 20 *l.* and in *August* 15 *l.* 2 *s.* making in whole 39 *l.* 2 *s.*—and that for the Balance of 28 *l.* due in *October* 1765, a Bill, dated 18th *October* 1765, payable to Mr. *Donaldson*, six Months after Date, was drawn by the Lady upon her Brother *Richard Corbet*, and actually accepted by him, and which Bill the Pursuer has been obliged to produce in this Process, together with a Protest taken on the 29th *April* 1766, bearing that Payment was demanded from *Corbet* the Acceptor, and that he answered, “That he could not pay the said Bill for want of Effects.”

From these Circumstances of the Payments made to the Pursuer, from time to time, while the Petitioner was in *Orkney*, and of the posterior Draught by this Woman upon her Brother, accepted by him, there arises real Evidence that it must have been on the Credit of the Lady and her Brother, and not of the Petitioner, that these Furnishings were made.

It was said by the Pursuer, in the Answers to the last Petition, that this Woman was introduced to him by Mrs. *Waldie*, Sister to the Petitioner, and Mrs. *Hamilton* his Niece; and that these Persons were her constant Visitors while she staid at the Pursuer's House.

But this Averment is, like many other of the Pursuer's, void of Truth. The real Fact is, that a considerable Time after this Woman had taken up her Lodgings with the Pursuer, she and her Brother Mr. *Corbet*, went to Mrs. *Waldie's* House, and told an artful, cunning, and seemingly plausible Story, of her coming to *London* with the Petitioner's Approbation, and affirming, that the Petitioner himself was coming to reside there. This so far gained Credit with Mrs. *Waldie*, that she returned the Visit at the Pursuer's House: But further than this Mrs. *Waldie* never went to see her in that House, but in order to desire the Pursuer to turn this Woman out of his House, assuring him that the Petitioner was determined to pay none of her Debts, and that he would pay no Regard to any Person that lodged her; and that, even if he had been willing to pay her Debts, his Circumstances in Life could never afford to pay 20 *s.* a Week for her Lodging, far less her other Extravagancies; and it will come out in Proof, that the Pursuer, long after that, applied to Mrs. *Waldie*, and begged of her to endeavour to prevail with the Petitioner to pay but a Trifle, and he would discharge the whole of his Claim; and so far was Mrs. *Waldie* from giving
any

any Countenance to this Proposal, that she wrote a Letter to the Petitioner, giving him an Account of the infamous Behaviour of this Woman who pretended to be his Wife; in Answer to which the Petitioner wrote, that he was determined never to live with her, or to have any thing to do with her.

Further, it has been all along set forth by the Petitioner, and not denied by the Pursuer, that some time after this Woman came to lodge in his House, and while the Petitioner still continued in *Orkney*, Mr. *Corbet*, having got from the Pursuer his Bill or Account, so far as then incurred, thought fit to try if the Petitioner would pay it, and with that View sent it to Mr. *Lindsay*, Merchant in *Kirkwall*, who accordingly made a Demand, which the Petitioner absolutely refused to answer, and told Mr. *Lindsay*, that he did not consider himself as liable for one Shilling of these Contractions; and this Refusal being reported to Mr. *Corbet*, he wrote to the Petitioner a Letter in Process, dated 4th *June* 1765, wherein he endeavoured to apologize for his Sister's Misconduct, begged earnestly of the Petitioner to forgive her Breach of Duty and shameful Peregrinations, intreated the Petitioner to come up to *London*, and try to bring her back to *Scotland*, though he owns, that she seemed determined not to return, he then adds: "As to running you in Debt she utterly denies it.—To be sure, her travelling about has cost a good deal of Money since she has been here. *I have made it as easy as I could.* I wish you had honoured the Bill in favour of *Donaldson*, as it might have prevented some Talk between People utterly ignorant of the Matter, and who, perhaps, might put Contractions foreign from the real Case, so that I have this Day paid such Bill, and said I received a Bill from you for that Purpose, which was the Reason of your not paying it."

In Answer to this Letter, the Petitioner wrote Mr. *Corbet*, that his Sister's Behaviour had been unbecoming, base, and infamous, from Beginning to End, and that he was determined never to have any more Concern or Connexion with her. Whether the Petitioner had room for apprehending, that this Lady was living in *London* upon his Credit, or at his Expence, after these Circumstances, is humbly submitted to your Lordships. But the Petitioner does acknowledge, that he was induced to go to *London*, in *August* 1765, partly with a View to try his Interest to get again into the Army; and, he will fairly own, that, if there had been any Chance of this

Lady's reclaiming, he would have done his Endeavour to bring it about.

As this Journey has been laid hold of by the Pursuer, as a mighty Circumstance against the Petitioner, and as the Account given of it was such as induced the Lord Ordinary, and afterwards your Lordships, to believe, that the Petitioner had, on that Occasion, countenanced this Woman, and cohabit with her while there, the Petitioner will beg leave to state the Matter in its true Light.

In the *first place*, the Petitioner expressly denies, that ever he saw the Pursuer, Mr. *Donaldson*, or any of his Family, or ever cohabit with this Woman in *Donaldson's* House. It has been much insisted upon, that two Evidences have sworn to the Petitioner's living with his reputed Wife in the Pursuer's House. The first of these, *James Pattison*, deponed, *inter alia*, "That, in the Month of August 1765, the said *James Fca* lodged with his Wife in the House "of the said *James Donaldson*." And *Elizabeth Murray* is marked as deponing "conform to the preceeding Witness (*Pattison*) in all "Points." But your Lordships will observe, that this Proof was adduced in Absence of the Petitioner, by a Commissioner of the Pursuer's own Nomination. This was none of the Facts admitted to the Pursuer's Probation, or which he had even so much as alleged, before the Act and Commission went out, which stood entirely confined to a Proof of the Furnishings libelled. Indeed the Proof was conducted in a very odd Manner, and the Pursuer seems to have been very attentive to obtain concurring Witnesses. One Witness, *Mary Murray*, is examined no less than four Times, and emits as many Depositions in one Day, in order to make her concur with preceeding Deponents. *Elizabeth Murray*, who is the Pursuer's Servant, is examined oftener than once, in the same Manner. And, *lastly*, the Pursuer himself depones, though there was no Reference to his Oath; and therefore it was extremely irregular in the Commissioner to have taken it; but even he does not depone to this Fact.

It merits likewise your Lordships Consideration, that this *Pattison* is both Father-in-law, and Servant to the Pursuer, and, therefore, a very exceptionable Witness; but the Petitioner does humbly contend, that these Depositions cannot be conclusive against him, when it is considered, that they may have been erroneously taken down, or what is likewise very probable, the Witnesses may have
been

been mistaken. It was an easy Matter for this Woman to pass any of her Gallants under the Name of *her Husband, Mr. Fea*. This is no unusual Thing with Ladies of her Constitution; neither is it unusual for their Paramours to enter into the Deceit, of which your Lordships had a very recent Instance, in the Case of a Gentleman who passed always in the *Fish-market* under the Name of *Mr. Rutherford*, but who was well known at the *Bristol Port* by the Name of *Mr. Turner the Farmer*.

Such may have been the Case here, and in such Manner may the Witnesses have been deceived; and as the Petitioner has all along offered, and does still offer to prove, that, during the whole Time he was at *London*, he lodged in the House of his own Sister, *Mrs. Waldie*, he hopes your Lordships will allow him an Opportunity of clearing up this Point, upon which the Lord Ordinary's Interlocutors are expressly founded; the more especially, when your Lordships consider, that, if the Petitioner had ever been in the Pursuer's House, it cannot be doubted, that the Pursuer would have applied to him upon a Matter of such Consequence. It would not have been to be wondered at, if the Pursuer had considered the Petitioner as his Paymaster, though he had applied for a Warrant to detain the Petitioner, until he had paid the Debt, or found Bail.

The Petitioner cannot help observing, that it was beyond all Measure absurd, in either this Pursuer, *Richard Corbet*, or his Sister, to imagine, or give out, that ever the Petitioner intended to reside in *London*; they well knew, that his Circumstances could never afford that Way of Life; for this Woman's Extravagance had reduced him to the Necessity of selling his Half-pay before he left *Ireland*; he had then no other Refuge, but retire to *Orkney*, where the only Fund of his Subsistence at present is, a Wadset, which yields betwixt 11 and 12 *l. Sterling per annum*.

One other Fact has been much insisted upon by the Pursuer: That he supported not only this Woman, but a Child of hers, for ten Months. The Petitioner owns, he cannot help expressing his Amazement at this bold Averment, which has not the smallest Foundation in Truth. The only Child she ever bore to the Petitioner never heard it pretended, until the last Paper was given in for the Pursuer, that any Child of hers had been at the Pursuer's House; if such had been the Fact, the Pursuer's Proof would not have been silent upon that Head; but there is not one Word of any
Child.

Child in that Proof; and the Petitioner offers to prove, by the Servants and others who had Occasion to be in the Pursuer's House, during this Woman's Abode there, that no Child of hers ever was there. But this Averment will be as clearly refuted as another made by the Pursuer, *viz.* that the Lady came to his House with a Child in great Disthable, from the *Orkneys*, where she had been for some Years with her Husband; whereas, it has already been stated, and can be proved by a Crowd of Witnesses, that this Lady was never above three Months in the *Orkney* altogether.

It was likewise averred, by the Pursuer, that the Petitioner had deceived Mr. *Corbet*, by giving him a bad Letter of Credit upon some Person in *London*, and this the Pursuer endeavours to support from a Letter of Mr. *Corbet's*, wrote to the Petitioner.

It would have made the Matter a little more plausible, if the Pursuer had condescended upon the Man on whom this Letter of Credit was given. This he has not chosen to do, as it would at once have detected his Story, for the Petitioner does positively aver, that he never gave a Credit to either the Pursuer or *Corbet*, upon any Person in *London*, and, indeed, the Story disproves itself, for it is alledged, that this Letter of Credit was granted by the Petitioner while he was in *London* in the 1765; had this been the Case, *Corbet* would certainly have called on the Person upon whom the Credit was given, or inquired into his Circumstances, and not accepted of a Credit that could be of no Use.

The Pursuer likewise takes up the Cudgels for his Lodger, and endeavours to defend her Character; which is a little singular, considering that the Pursuer had so frequent Occasion to observe her abandoned Behaviour, and which was the Cause assigned by him at last, for turning her out of his House.

In a Word, *Richard Corbet* and his Sister were the only Persons to whose Credit the Pursuer trusted, but they afterwards united in a Scheme to load the Petitioner with this Woman's Contractions, unless he would be prevailed upon to send her an extravagant Sum for her future Support; and finding this Scheme not likely to succeed, *Corbet* writes a Letter to the Petitioner, on the 13th *February*, 1765, long after the Furnishings libelled were made: in this Letter, which is in Process, *Corbet* throws out many groundless and injurious Reflexions against the Petitioner, and pretends that his Sister was now willing to return, providing the Petitioner would remit her 100*l.* and, intending to justify her Misconduct, he uses these

these Words: "What was wrote to you by *Donaldson*, (who is a very troublesome bad Man) you must pay no Regard to. I have paid him his Demand, save a few Weeks that he has no Sort of Right to be paid for."—When this is joined to *Corbet's* accepting the Bill for 28*l.* and afterwards refusing to pay it, but no Pretence of Insolvency, or Proof of Diligence done against him, there cannot remain a Doubt that the whole is a Contrivance betwixt the Pursuer and *Corbet* to load the Petitioner with a Debt already paid. It is plain that *Corbet* paid a Part, that he accepts a Bill for the Remainder; and he now avers that the whole was paid. In these Circumstances the Pursuer should be allowed to settle Matters with Mr. *Corbet*, and to operate his Payment from him, if any thing be still due, or from the Lady's present Husband, as the Petitioner has no Concern in the Matter.

But, in the last Place, the Petitioner hopes to convince your Lordships, that the Conduct of this Lady has been such as relieves him from all Contractions of any Kind made by her. By the Law of this Country, a Husband is liable for necessary Furnishings to his Wife living in Family with him, she being, by her Husband, *proposita negotiis domesticis*; but the Reason ceases, when a Wife, without Maltreatment, deserts her Husband, and follows unlawful and irregular Courses; for a Wife is obliged to reside with her Husband, his House is her *domicilium*. No stronger Case of wilful or causeless Desertion can occur, than has happened in the present Case, where the Lady not only leaves her Husband, but goes to a foreign Country and leads an abandoned Life, and lives in a most extravagant Manner, paying no less than 52 *l. Sterling, per annum*, for Room-rent alone, when her Husband's whole Income did not exceed 12 *l. per annum*; and in such a Way, as that her pretended Husband could neither know of, far less put a Stop to this extravagant Conduct, and, at last, she marries another Husband. Lord *Bankton*, in his Institutes of the Law, has these Words; "If the Wife deserts the Husband, without such sufficient Cause of Departure, § 140, P. 137. "he may obtain a Divorce against her, upon malicious Desertion, "but will, by no means, be liable to aliment her, the Wife being, "by all Laws, bound to cohabit with her Husband." And the same Author, in another Passage, says, "But if a Wife desert Vol. I. "from her Husband, who allows her an Aliment, or if there is P. 126. "a Separation, *a mensē et thoro*, with which Alimony is concomitant, or thereto subsequent, personal Execution will proceed against

V. L. I.
P. 422. Small
Edition.

"gainst her, for Payment of Bonds granted by herself alone, for Things furnished towards her Entertainment, nor will the Husband be at all liable, and much less for Furnishings to her, after an Elopement with an Adulterer." Such is the Opinion of the Writers on the *Sets Law*. Such, likewise, is the Opinion of the *English Lawyers*. The late Author, Mr. *Blakeston*, in his Commentaries on the Law of *England*, when treating this Subject, expressly, says, "In case of a Divorce, *a mensu et thoro*, the Law allows Alimony to the Wife." And, a little further down, "But in case of Elopement, and living with an Adulterer, the Law allows her no Alimony."

Agreeable to these Principles, are your Lordships Decisions. Thus, in a Case observed by *Haddington*, in 1610, it was found, that a Husband is not liable for Furnishings made to a Wife who lives a scandalous Life, a-part from her Husband; and in the Case of *Lady Kinslains* against her Husband, 19th *July*, 1711, the Court would not even reimburse the Husband to the Expence of the Wife's Journey to *Bath*, for Recovery of her Health, without his Consent, beyond what was proved to be absolutely necessary, although she had no Intention of deserting him altogether, and was advised by Physicians to go there. Lord *Fountainball*, who collects this Decision, says, that the Lords found, "That where a Man is willing to alimant his Wife, she cannot crave a separate Alimant, unless she proves *sevitia* or Maltreatment, and that she cannot desert his Family; yet, if her Sickness require it, and his Fortune can bear it, he is obliged to promote the Cure, though it be by going to the Baths or other medicinal Waters; and, therefore, sustained the Process, at her Instance, against her Husband, in so far as the Money was necessarily advanced to her Journey to *England*." And, lastly, in the Case of *Allen* against the Earl of *Sutherland*, 6th *July* 1677, observed by Lord *Stair*. The Earl of *Sutherland* being pursued for Payment of an Account, furnished to the Countess at *London*, who had not totally deserted him, it was found, if the Countess went to *London*, without his Approbation, or a just Reason, that the Earl was obliged for no more than would have been her Expence, if she had remained at home, and that whether she was inhibited or not.

From these Authorities, it would appear, there was no Occasion for a Husband's using Inhibition, to secure him against extravagant Contractions made by a Wife who had causelessly deserted him; in the present Case, indeed, Inhibition could have been of

no Use, as such Diligence used here, could have been no Interp-
 lation to foreign Creditors ; neither did the Husband know any
 Form of Diligence he could have used to interpel these foreign
 Creditors, and the Pursuer has not been pleased to point out
 any.

*MAY it therefore please your Lordships to alter your last
 Interlocutor, and to assilzie the Petitioner from this
 Process simpliciter ; or, at least, before Answer, to al-
 low the Petitioner a Proof of the Facts above set furth,
 so far as not already instructed, particularly with re-
 spect to the Minority of this Woman, Corbet, in the
 Year 1759 ; her deserting the Petitioner in Company
 with Captain Gordon of the Alarm Cutter ; her Expe-
 dition with him to the Highlands of Scotland, from
 thence to Ireland, and of her abandoned Life there,
 and in London ; her Marriage with Sandford, and
 Trial that thereupon ensued ; and as to the Place of the
 Petitioner's Residence while in London in Harveft
 1765 ; and of all other Facts and Circumstances, tending
 to show that the Furnishings libelled were not made
 on the Faith of the Petitioner.*

According to Justice, &c.

JOHN DOUGLASS.

FEBRUARY 1. 1769.

A N S W E R S

F O R

JAMES DONALDSON Linen-Draper in *London*;

T O T H E

PETITION of JAMES FEA of *Clestrain*;

THE respondent had the misfortune in *February* 1765, upon the recommendation of Mrs. *Waldie*, sister, and Mrs. *Hamilton* niece to the petitioner, and Mr. *Corbet* brother to Mrs. *Fea*, to set lodgings to the said Mrs. *Fea*, for herself and her servant, and in which she continued for about ten months, down to some time in the month of *December* thereafter, and during all the time that she staid under the respondent's roof. The sister and niece of Mrs. *Fea* were her principal visitants and companions, and no woman whatever could appear to act with more propriety, or seem more careful and industrious.

The respondent considered, that he was here dealing with persons of honour and character, Mrs. *Fea* was represented by all her friends, as the lady of a gentleman of considerable fortune in the north of *Scotland*, who was shortly, after settling his affairs, coming to reside at *London* in a family way; and which, notwithstanding of all the stories now told, appears undoubtedly to have been the plan, and Mr. *Fea*'s resolution, as shall be shown in the sequel.

Mrs. *Fea* had occasion for many necessities when she came to the respondent's house, and which he and his neighbours had no scruples to provide her with, for the respondent was told by Mr. *Corbet*, that Mr. *Fea* would make proper remittances, till he himself should arrive at *London*, and the respondent accordingly got
fun-

Memor.

P. 4.

fundry partial payments from Mrs. *Fea*, as he supposes, when the money came to hand ; for, in the proceedings in this process, it is acknowledged by Mr. *Fea*, that after his wife had gone to *London*, and, as he is pleased to term it, had deserted him, “ That he had supplied her from time to time, with more “ money than he could well afford.”

In the ten months that she dwelt in the respondent's house, including the expence of board for herself and maid, cloaths for herself and child, surgeon's account, and some articles of furniture, such as silver spoons, and china, sheets, &c. the whole together only amounted to between 80 and 90*l. Sterling*; and tho' Mr. *Fea* has been pleased to raise a great cry of Mrs. *Fea*'s extravagance, and the great load of debts that she might possibly have run him into, he has not been pleased to condescend upon one article, or that during all the time she staid in the respondent's house, she contracted one farthing more than what is contained in these accounts, which, from the nature of the thing, and *ex facie* of the accounts themselves, is real evidence that Mrs. *Fea* got nothing more than was absolutely necessary for her subsistence, and that in these, nothing appears like the conduct and character of the person which Mr. *Fea* is now pleased to paint out.

How, or in what way Mrs. *Fea* left her husband in the *Orkneys*, or whether with or against his will, the respondent has no access particularly to know, but it is pretty obvious, that the history of this matter, as given by Mr. *Fea* in his petition, must be grossly misrepresented, otherwise Mr. *Fea*'s after conduct must prove, he is not overnice, and excessively good natured.—If Mr. *Fea* had produced the whole train of correspondence from *London*, or if the respondent could recover his letters, it is apprehended this matter might wear a different aspect from the light that it is now put in by the petitioner. He has been pleased to produce two letters from Mr. *Cochet*, as favourable to his cause, which the respondent will here take the liberty to insert; and he apprehends, that from these and the proof taken in this process, the whole force of Mr. *Fea*'s argument is totally removed.

Page 2
673

“ Dear Sir, I am extremely sorry, that the behaviour of Mrs. *Fea* should give you room to complain in the manner you do, “ and can assure you it gives me more trouble, than perhaps you “ may figure to yourself, but there is no accounting for any “ thing, particularly the frailty of human nature, yet were I to speak

“ speak for any thing, I did not, with the greatest certainty,
“ know, I would say her virtue and honour is still immaculate.
“ Your letter of *March* and also of *May*, came duly to hand,
“ and I had prevailed on her to go to you, and, as duty
“ bound her to to do, she consented, and preparations were
“ making, (notwithstanding, I never heard a creature detest and
“ abhor any thing so much as she does the *Orkneys*;) *but your last*
“ *letter has raised new fears in her mind, so that all I can say will*
“ *not persuade her to go, until you seem better pleased with her*
“ *past conduct; and as to running you in debt, she utterly denies it,*
“ *and says, you cannot point out any thing she run you in debt in, but*
“ *by your free wil and pleasure.* For my part, I don't know what
“ to say; nothing I wish for more than a happy reconciliation.
“ To be sure, *her travelling about* has cost a good deal of money:
“ Since she has come here, I have made it as easy as I could: *I*
“ *wish you had honoured the draught in favour of Donaldson, as it*
“ *might have prevented some talk between people utterly igno-*
“ *rant of the matter. and who, perhaps, might put constructions*
“ *foreign from the real case; so that I have this day paid such*
“ *bill, and said I received a bill from you for that purpose, which*
“ *was the reason of your not paying it.* I would (my dear Mr.
“ *Fea*) do all in my power to have every thing lulled into tran-
“ quillity, but no person (who so much wishes for it) enjoys it
“ less: *I would only wish, that you would point out what you would*
“ *have done:* as I find she is determined not to go, *unless something*
“ *is done to secure her quiet in a desolate place* (as the calls it.) Some-
“ times (and most frequently) a generous and forgiving disposi-
“ tion operates upon the mind, more than an austere and rigid.
“ Suppose this was tried with a remission of the past, *and the of-*
“ *fer of coming yourself to conduct her home.*—Consider of it, and
“ let me know your thoughts; *the infant you mention is at Chester;*
“ *she wishes it was with you; she says it shall be sent in case she*
“ *is not to go herself, but I hope this will be settled: I have en-*
“ *quired into the number of bills and the value since she left you, and*
“ *if her accounts is right, they have been very moderate.* Pray, let
“ me hear from you immediately, and let your manner of speak-
“ ing with respect to her, be in terms that may (as I sincerely
“ wish) bring you to a happy union, which is the hearty wish of
“ *your truly affectionate friend and brother, (Signed) Richard Cor-*
“ *bet.*”

It appears from the depositions of two witnesses, that after this, viz. in August 1765, Mr. Fea the petitioner went to London, and lodged some time with his wife in the respondent's house; and at this very time, the respondent received a payment of 15 *l. Sterling* as marked in his accompt; but not the least hint or surmise was given by Mr. Fea or any of his friends, that her staying at London was not perfectly agreeable to her husband: Nay, it is quite clear from the following letter to be after insert, that it had then been concerted among them, that Mr. Fea, after settling his matters in the north, should come and reside with his wife at London; and in order to support her in the mean time, he had furnished his brother with a letter of credit to raise money upon and make advances for her, till Mr. Fea himself got to town: But it appears this credit had not been good, as Mr. Corbet complains, in the following letter to Mr. Fea.

Feb. 18.
1766.

" Dear Sir,—Your long and unaccountable silence did not
 " more surprize me, than *your very extraordinary letter*. I did not
 " think Mr. Fea was of such a *flexible and unstable disposition*, to
 " be like a reed shaken with the most gentle zephyr. You begin
 " your letter, not as if you had a breast of common humanity:
 " *For, notwithstanding you were informed, by repeated letters, of the*
 " *miserable situation of your wife*: you, instead of tending her
 " any thing to help her, fill your letter with upbraidings of past
 " things, that you would get no human being (except an *Orkney* old
 " woman) to join you in. I must next inform you, that I be-
 " lieve one tenth of the stories you have heard, to be groundless,
 " and should not be heard with any degree of patience. What
 " was wrote to you by *Donalajon* (who is a very troublesome
 " bad man) you must pay no regard to: I have paid him
 " his demand, save a few weeks that he has no sort of
 " right to be paid for. There are some other small demands
 " against her, to the amount of about 20 *l. Sterling*; but I
 " see no prospect of any thing being done by you fairly, there-
 " fore the people say they will have recourse to foul means,
 " which is shameful to think on. Upon the whole, if you
 " have a mind to secure to yourself any real happiness, I
 " would recommend it to you immediately on receipt hereof, to
 " come here in person, *or send a bill for upwards of 100 *l.* which*
 " *will enable you to come to you in a discreet manner*, and put an
 " end to the many scandalous sayings that are justly levelled at
 " you,

“ you for so basely and inhumanely neglecting her. If something
 “ is not immediately done by you, the consequence must
 “ fall upon you: And if you conscientiously ask yourself the ques-
 “ tion, you must say, that you have treated her ungenerously and
 “ bad: For my own part, I am tired and sick of the affair, and
 “ would not have meddled in it, had I the least notion that
 “ you, (at the time you made such fair promises of your intention of
 “ coming to live here,) intended nothing but to deceive me and
 “ take me in. It was a thought foreign to my breast, that Mr.
 “ Fea would or could act with such dissimulation and ungenerosity;
 “ but so it was I would be glad to hear from you by return of
 “ post what is your real intention; till then will suspend my ul-
 “ timate opinion, which I hope you may give reason to alter in
 “ your favours; and that you will send a good bill, in order to
 “ enable Mrs. Fea to go to you. she being now willing to go; or, that
 “ you will come in person; but pray don't bring such a letter of credit
 “ as you did last, which deceived me.”

The respondent need only observe here, that as Mr. Corbet could not raise money upon the letter of credit Mr. Fea had put into his hands, nor could get any remittances from him, he refused to make any further advances on account of Mrs. Fea: So that the respondent, and sundry other honest tradesmen, who had supplied her with necessaries, were obliged to bring a process against Mr. Fea before this court for payment of these furnishings.

The respondent will not trouble your Lordships with a minute narrative of all the judicial proceedings, which, from first to last, have been such on the part of Mr. Fea, as appear calculated rather to evade than to bring the question to a determination: And the respondent cannot help observing, that in this view Mr. Fea has often been inconsistent with himself, and seems to have adapted his facts to the arguments that he intended to maintain; for, in the defences returned upon the summons, and in the minutes of debate before the Lord Ordinary, he never once pretends to say, that Mrs. Fea was not his lawful wife: He there sets forth, “ That the defender, who was for sometime in the army, having married a young lady of the kingdom of Ireland, brought her home, at the end of last war, to his estate in Orkney: But the not relishing that part of the world, thought proper to leave him, and take up her residence in the house of James Donaldson, the pursuer: That the defender went in search of her, and in-
 “ treated

"treated her to return; but this she thought proper to refuse, and to remain with *Donaldson*." And in his defences, he also avers, that he had used inhibition against her.

The Lord Ordinary having allowed a proof; which being reported, and memorials ordered thereupon: In that for Mr. *Fca*, he mentions the facts much in the way as has been before recited; "That sometime before the defender left the army, and while quartered in *Ireland*, he happened to marry a young lady of the name of *Corbet*, a native of that kingdom." He then goes on telling the story, how she had eloped from the *Orkneys*, and gone to *London*: That he had gone there in hopes of reclaiming her; but that as she would not return, he was obliged to leave her, and had supplied her, from time to time, with more money than he could well afford." And in this memorial, the petitioner always calls her by the name of Mrs. *Fca*, or his wife.

The Lord Ordinary having given the cause against the petitioner, in the first representation against that interlocutor, he there repeatedly styles Mrs. *Fca* his wife; and his whole plea is founded upon her alledged desertion.

Dec. 1. This first representation, upon answers, being refused, a second
1767. representation was given in: He then styles the lady by the name of Mrs. *Corbet*, and says, "The representer was never lawfully and affectionately married to the said *Jean Corbet*: Their connection begun in a foreign country; by the laws of which, its validity fell to be determined: But the fact is, that by the law of *England* the marriage has been null and void *ab initio*; and the representer has lately received letters, both from this lady and her brother, Mr. *Corbet*, disclaiming all connection with him as her husband: These letters, with more full instructions on this material point have been wrote for within these few days, and are expected as fast as the distance from *Orkney* will permit."

Having learned, that the petitioner and his wife were formally married in the parish of *Saint Clement Dunes*, in the county of *Middlesex*, in the year 1752, the respondent applied and got a certificate thereof from the curate, which he produced with his answers; to this second representation was refused.

A third representation was thereafter preferred, arguing, that this certificate did not prove the alledged marriage. "The description of the parties there given may apply to another *Jane Fca*, or *Aunt Corbet*, as well as to the representer,"

“ presenter, who never passed under the designation therein
 “ contained. Besides, this certificate is otherwise not pro-
 “ bative, and can never, *per se*, prove, that the representer
 “ was formally and effectually married to *Anne Corbet* accord-
 “ ing to the laws of *England*.—At the same time, the repre-
 “ senter has never denied, that *Anne Corbet* did for sometime co-
 “ habit with him, and pass under his name as his wife.”—And
 then the argument proceeds upon the supposal, that if there had
 been a marriage, it was absolutely void and null, in terms of the
 statute 26th of *Geo. II.* cap. 33.—This representation, upon an-
 swers, was refused, and a reclaiming petition has been refused
 by your Lordships.

Another reclaiming petition has been presented to your Lord-
 ships, in which it is set forth, that Mr. *Fea* contracted an inti-
 macy with this lady while stationed in *Ireland*, and she bore him
 a child in the 1762, which is taken care of by the lady's mother
 in that kingdom: That she was brought to the *Orkneys* in the
 1764; but resolving “ to take the first opportunity of making her
 “ escape to other parts,” she borrowed in the petitioner's name
 considerable sums of money from different people in the *Orkneys*,
 which, with his gold watch and her cloaths, she carried private-
 ly away, and in concert with Captain *Gordon*, of his Majesty's
 cutter *The Alarm*, made her escape, and was carried by the cap-
 tain to *Belfast*, where her mother lived; but she, “ who was well
 “ acquainted with her former conduct, absolutely refused to
 “ see her, and would not so much as allow her to see her
 “ own child.—Of this the petitioner had information by his ser-
 “ vant *Thomas Greig*, now a vintner in *Kirkwall*, whom the pe-
 “ titioner sent after the lady to *Ireland*, to endeavour to persuade
 “ her to return to *Orkney*.”—Then the history goes on, that the
 lady took lodgings near her mother, where she lived an infamous
 and abandoned life, till she was obliged to sell her cloaths and
 gold watch. She then went to *London* at the expence of an *Irish*
 captain, with whom she lived for some time; but being discar-
 ded by him, her brother Mr. *Corbet* “ endeavoured to procure her
 “ lodgings at the house of Mr. *James Coupar*, No. 3. of *Cecil's*
 “ *Street* in the *Strand*, and in which house she had formerly lived
 “ with the petitioner:” But being refused admittance there, she
 was at last settled with the respondent, where the petitioner visit-
 ed her, with a view to reclaim her, and make her return, but
 she

she refusing, the petitioner left her, and sometime afterwards she was married to a gentleman of considerable fortune, of the name of *Sandford*.—To this may be added, that though, all along, hitherto, the petitioner has averred his wife was a native of *Ireland*, he has now discovered, in order to quadrate with his arguments, that she is a native of *England*, and was born at *Liverpool*.

This is the sum of the history of this lady, as given by her husband; and if it was true, it might, indeed, justly be denominated, *The barlot's progress*. But the respondent never had access to know, or, before, to hear, anent the most part of all these facts: And as he has had occasion to observe, through the whole of this process, that the petitioner has not been over nice nor scrupulous in his averments, and from sundry other circumstances which doth appear in the cause, it is not possible to imagine, that they can be true; and a number of the new averments do appear clearly disproved.

The respondent cannot conceive it is possible, that Captain *Gordon* of the *Alarm*, a gentleman who bears his Majesty's commission, could be guilty of such a horrid and daring crime, as to enter into a concert with Mrs. *Fca*, to carry her off from her husband in the way that has been represented by the petitioner. It might, indeed, possibly happen, that this lady, when going to visit her mother and her child at *Ireland*, might get her passage from Captain *Gordon*, which, by the bye, the respondent never heard of before; but it is impossible to believe, that the Captain would have admitted her on board his ship in the clandestine manner represented; or, if true, that Mr. *Fca* would not have demanded from the Captain reparation for the injury, one way or another. For, if it was true, undoubtedly a high injury was done by the Captain to Mr. *Fca*; and, if it was not true, the manner that it is stated in the petition is most injurious to Captain *Gordon*.—But with this the respondent has no concern.

That Mrs. *Fca* should be able to borrow considerable sums in the *Ordnance*, without the privity of her husband, is a circumstance that will not readily be believed, especially, when taking the fact as asserted by Mr. *Fca* to be true, that he was at present possessed of no more but a wadset of about 11 *l.* or 12 *l.* a-year.

Neither

Neither can it well be imagined, that Mrs. *Fea's* mother would not see her when she went to *Ireland*, or allow her to see her own child, nor that she should lead an abandoned, infamous life, the next door to her mother. This alledgeance appears clearly disproved from Mr. *Corbet's* first letter to Mr. *Fea*, wherein it is evident, that Mrs. *Fea* had brought her child to *England*, and had left it with some friend at *Chester*: And from the respondent's accompts, it appears, that Mrs. *Fea* got from the petitioner many articles of wearing apparel, and cloaths for the child, which were sent to it, and which compose a part of the very sum now pursued for.—This must therefore satisfy your Lordships, that this alledgeance is groundless.

If Mrs. *Fea* had deserted her husband in the way set forth in the petition, it can hardly be imagined, that the petitioner would have sent his servant after her, as he says he did, to persuade her to return. If he did so in such circumstances, the respondent will be pardoned for saying, that the observation made in the petition, "That the *Scotch* north-country squires do not "want their share of vanity," will by no means apply: For before Mr. *Fea* can aver the facts here alledged against his wife, and his sending after her to bring her back, as he says he did, he must profess himself divested of every delicate sense and feeling, which scarce any man living, even in the lowest situation, can be supposed not endued with.

If Mrs. *Fea* had robbed her husband, deserted him, and followed the infamous and abandoned practices that is charged by the petitioner, Can it be supposed, that he would ever have sought after her, or wanted to live with her more? But your Lordships see, he is keeping up a continual correspondence with her and her brother after she arrives at *London*; indeed Mr. *Corbet's* letter of the 4th *June* 1765, shows, that Mr. *Fea* had been complaining of some things in his wife's conduct, perhaps both on account of her expensive jaunt, and some suspicions of her virtue, both which, Mr. *Corbet* assures him, are without any foundation, "That her virtue and honour was still immaculate;" and that she had contracted no debt, "but by Mr. *Fea's* free will and "pleasure."—She is willing even to return to the *Orkneys*, if Mr. *Fea* would come for her, "and something is done to secure her "quiet in a desolate place."

Or, can it be supposed, that Mr. *Fea* would ever have gone to *London* to look after a woman of this character, which he acknowledges he did in *August* 1765; and upon reading Mr. *Corbet's* letter of the 18th *February* 1766, which the petitioner has been kind enough to produce, will your Lordships not believe, that every thing was then settled between Mr. and Mrs. *Fea*? and that if it had not been agreed upon before, it was at least now clearly concerted, that Mr. *Fea* should come and reside at *London* with his wife.

Thus far, as to the facts alledged by the petitioner against his wife, which he craves to be allowed a proof of: But the respondent apprehends, from the observations already made, these allegations will appear to your Lordships to disprove themselves; and though they were ever so true, yet they can have no sort of influence in the present question.

It will appear to the court, that the respondent must be altogether unacquainted with the private history of the parties, or how they came thus to be separated. The letters from *Corbet* to the petitioner are the only aids which the respondent has to find out the true history in sundry particulars. Mr. *Fea* has produced these letters; and your Lordships will not imagine, that Mr. *Corbet* said any thing therein relative to what had past between him and Mr. *Fea*, but what was certainly true: And it is submitted to the court, if the following facts are not clearly deducible from these letters, and from what appears from the petitioner's own state of the matter.

That Mrs. *Fea* had gone upon a visit to her mother and child in *Ireland*, and also to her friends in different places of *England*, and had at last arrived in *London*, where she had sundry relations; and where, from Mr. *Fea's* own account of the matter, she and he had dwelt together for some time.—That she had no great mind to return to the *Orkneys*, but was prevailed upon to do it, if something was done to secure her quiet in a desolate place, and if her husband would come for her to *London*. The petitioner says, he provided her from time to time with what money his circumstances could afford; and Mr. *Corbet's* first letter directly says, she had spent none, nor contracted any debt, *but according to the free will and pleasure of her husband*.

That Mr. *Fea* went to *London* in *August* 1765, in order, as he says, to reclaim his wife, and persuade her to return, stands ac-
know-

knownedged by himself; and it is proved by two unexceptionable witnesses, that he staid with her at the respondent's house at this time; and though he now wants to disprove that fact, yet, can your Lordships possibly believe him, when the following circumstances are evident from Mr. Corbet's letter of the 18th February 1766?

That when at *London*, every difference was reconciled between Mr. Fea and his wife: That the plan was then formed, that they should live at *London* together, so soon as Mr. Fea had got his matters settled in the north country; and that, in the mean time, Mr. Corbet was to be provided with a letter of credit, to support her till Mr. Fea returned from the north. Says Corbet, "*I would not have meddled in it, had I the least notion that you, at the time you made such fair promises, of your intention of your coming to live here. intended nothing but to deceive me, and take me in.*" And at the close of the letter, wherein he is desiring Mr. Fea to send a good bill, to defray Mrs. Fea's expences in returning home, or to come in person to bring her, he then adds, "But pray don't bring such a *letter of credit* as you did last, which deceived me."

Mr. Fea has not pretended to say, that Mr. Corbet had mentioned any thing in his letters but what was fact, nor can it be supposed, that he would be mentioning what had directly passed between themselves, but according to the true state of the matter; nor has the petitioner pretended to make any comment upon Mr. Corbet's letter; it will admit of none, but the true *res gesta*: It was settled, that Mr. Fea should come, and live at *London* with his wife, and that Mr. Corbet, her brother, should take care of her in the mean time, and got a letter of credit for that purpose, by which he says he was deceived and taken in: This very circumstance, by itself, unhinges the whole of the petitioner's plea, and shows that at the very time when Mrs. Fea staid in the respondent's house that she and her husband was in the best terms; and that it was an agreed point, that she should stay in *London*, where her husband was shortly to come, and reside with her; and that a letter of credit was granted to Corbet, to defray the *interim* expence. And this was, indeed, the story which the respondent was always told by Corbet, and which, from his letters to Mr. Fea, appears undoubtedly to have been the fact.

How absurd is it then in the petitioner, to plead, that his wife eloped from him, and deserted him, in the prosecution of vicious courses, when it is clear to demonstration, that she was always ready to have returned to the *Orkneys*; but that she staid in *London*, entirely by the approbation of her husband, and upon his promises, and declared *intention*, that he would come and live with her there, after having given her brother a letter of credit, to support her in the mean time.

It is said, that it was nowise likely, that a person of the petitioner's fortune would pretend to go and live at *London*; and he is represented to be possessed of no more than some pitiful trifle. With respect to the petitioner's fortune, the respondent is, indeed, in the dark as to this, as well as the other facts; but, from information, he has heard, that it is worth about 400 *l.* or 500 *l.* a-year: But as to the fact, of the petitioner's promising to go and live at *London* with his wife, he has furnished the very evidence of this himself, from the correspondence between him and his brother-in-law Mr. *Corbet*.

The respondent, therefore, apprehends, that it is evident to a demonstration, there was no desertion in the case, as to Mrs. *Fca*, long after she had left the respondent's house: For, by Mr. *Corbet's* missive in the 1766, your Lordships see he is complaining of Mr. *Fca's* inhumanity, and bad treatment of his wife; and seeing Mr. *Fca* had changed his mind, of coming to reside at *London*, she was willing to return to the *Orkneys*, if he would either come for her, or send 100 *l.* bill, to discharge her debt, and defray her expences down; so that, in fact, he was the deserter, and not the deserted.

His own plea, in some particulars, and the facts which your Lordships must believe, are altogether inconsistent with the plea of desertion: For, abstracting from the letter of credit given to *Corbet*, does not Mr. *Fca* himself maintain, that he supplied her from time to time with what money he could afford? and does not *Corbet's* letter also bear, that she had spent no money but with the free-will and pleasure of her husband?—There are circumstances irreconcilable with the notion of a desertion, or an elopement.

It is also a material fact in this cause, that Mr. *Fca* lodged with his wife, in the respondent's house, in *August* 1765, as swore to by two witnesses.

Mr.

Mr. *Fea* is now pleased to deny this fact, and objects to the witnesses:—Says he, *James Pattison* is both father-in-law and servant to Mr. *Donaldson*, and *Elizabeth Murray* is also his servant.

This is a very new discovery, and appears very improbable, and is in good part disproved *ex facie* of the oaths themselves: For *James Pattison* is deigned thus, “*James Pattison*, of the parish of *St. James, Westminster*, in the county of *Middlesex*, “*upholsterer*, widower, aged 70 years;” he depones, That he had lodged in Mr. *Donaldson*’s house for several years, “and particularly, at the same time, Mrs. *Fea*, wife of *James Fea*, “the defender, lodged there.” And he afterwards swears to Mr. *Fea*’s lodging with his wife in *August 1765*.—*Elizabeth Murray* was not servant to Mr. *Donaldson*, but to Mrs. *Fea*, while she staid in his house. This witness concurs with *James Pattison*, and her *causa scientiæ* is, “*That she lived as a servant to the said Mrs. Fea, during the time she lodged with the said James Donaldson.*”

Though these witnesses had been in the situation as described by the petitioner, it is apprehended, that would have been no objection whatever to their testimonies: For no person can be supposed to prove facts that pass within his own house, but by those of his family who can have access to know them. It is therefore apprehended, that the petitioner’s denial of this fact can never avail him; and that his offering to redargue it at this time of day, by contrary proof, is such a demand as was never yet allowed. When the respondent was allowed his proof, the petitioner might have had a conjunct proof, if he had thought proper; or, if he had inclined, he might have named the commissioner, and attended the examination; and, upon his failing to do this, the commissioner appointed by the Lord Ordinary was the Judge Ordinary, or any of his Majesty’s justices of the peace: And the proof was accordingly taken before a justice of the peace, by witnesses of unexceptionable characters; and these depositions, as to this particular fact, are confirmed by what appears evidently to have been the agreed plan at this time, That Mr. *Fea* should come and reside at *London*.

The respondent, therefore, apprehends, that the whole of the facts mentioned by the petitioner, with respect to his wife’s life and conversation, though true, and which the respondent does not believe, yet they would be noways relevant to defend in this

D

action;

action ; seeing nothing seems to be more certainly fixed, or better proved, than this. That there was no desertion on the part of Mrs. *Fea* : She was always willing to have returned to the *Ordnans* : She staid at *London* by the approbation of her husband : He supplied her with some money ; he visited her at *London*, and staid with her for some time, when it was concerted, that he should return and dwell with her at that place ; and also, made provision for her sustenance, till that should happen. So that the whole of the argument, and the law quored to prove, that when a wife elopes from her husband, and leads an infamous life, that the husband is noways bound for her alimony, has nothing to do in the present question.

The petitioner has never denied his knowledge of his wife's staving in the respondent's house ; of her passing for the petitioner's wife, and taking his name : And he has never pretended to say, that he ever gave the least hint or intimation to the respondent of such a thing being anyways disagreeable ; or that it was not intirely with his approbation : Therefore, in this view of the case, though this ludicrous argument, now taken up by the petitioner, was true, contrary to his repeated former acknowledgments, that Mrs. *Fea* was his wife ; that this was a name only assumed ; or that the marriage was null by the laws of *England* ; yet surely, as long as she bore that name with Mr. *Fea*'s knowledge, he was partaker with her in the fraud, and, from every principle of law and equity, was as much liable for her debts and contractions, as if she had been his wife ever so legally and effectually. The marriage act has provided no sort of stamp for the foreheads of those who are married in terms of the statute. Third parties, therefore, can know nothing about the matter : And where a man and woman passes as married, or a man allows a woman to assume his name, those contracting with them are not obliged to know any latent defect, or what nullity might be proposed against the marriage itself. It would, therefore, with submission, be most unreasonable, and contrary to every principle of law and justice, to say, that this could have any hurtful tendency towards parties that had no sort of concern with that matter.

The petitioner always argues, as if the respondent had trusted intirely to the faith of Mr. *Corbet* and Mrs. *Fea* : But, though that had even been the case, still Mr. *Fea* would be liable ; for he would have been liable to Mr. *Corbet* for the necessaries, had

Corbet made the payment : And as the petitioner will not pretend, that he has paid *Corbet*, it comes to the same thing to him in paying the respondent.

But, *2dly*, Upon this point your Lordships will observe a contradiction in the petitioner's state of the case ; for, he says, he refused to pay a draught in favours of the respondent, sometime in the beginning of summer 1765, when Mrs. *Fea* staid in the respondent's house. And from Mr. *Corbet's* letter of the 4th June, your Lordships see *Corbet* is telling Mr. *Fea*, that this draught which he had dishonoured, he, *Corbet*, had paid, to keep things hush, and to prevent any reflections from being thrown upon Mr. *Fea*. How is it then possible for the petitioner consistently to argue, that the respondent did not deal with Mr. *Fea* upon the faith of her husband's credit, when your Lordships see Mr. *Fea* in the next paragraph acknowledging, that the respondent was paid part of his advances by bills drawn upon Mr. *Fea* ; and though this circumstance also proves, that the respondent was in the constant use of supporting Mrs. *Fea*, as the wife of the petitioner, and with his knowledge, yet never on occasion thereof, or when Mr. *Fea* was in the respondent's house, does he pretend to give the least hint, that the respondent was doing any thing improper. Mr. *Fea* may argue upon this matter as he chuses, he may tell as many stories as he thinks proper of his wife's infamy and prostitution, and she again, and Mr. *Corbet* may throw as many reflections as they chuse upon Mr. *Fea* for his maltreatment and inhumanity towards his wife, in leaving her in a miserable situation for want, and of his deceiving and taking in *Corbet* to support her, but what has all that to do in the question ? Most probably the respondent, and other plain tradesmen like him, were they allowed to pass their sentiments, might indeed say, they had been very unlucky to have had any dealings or transactions with any of the three ; and that the litigation maintained in this matter, and defence now offered, does no sort of honour either to Mr. *Fea*, or the country he belongs to.

The petitioner professes his amazement at the respondent, for formerly averring that he supported this lady and her child for 10 months, when it is certain, that the child always staid with its grand-mother in *Ireland*.

So far it is true, that this child did not get its board from the respondent ; but had the gentleman looked at the accompts, he would see, that different suits of cloaths were furnished by the
respondent

respondent for this child, and sundry articles on its account, which were sent by Mrs. *Fen* to *Chester* where the child staid, and not with its grand-mother in *Ireland*.

The respondent will not trouble your Lordships at all with the arguments used upon the marriage act: It will be observed, that Mr. *Fen* repeatedly acknowledged in his proceedings before the Lord Ordinary that he was married to this lady, a *native of Ireland*, lived with her as his wife in *Scotland*, and it is obvious, that she always pass'd for his wife, and bore his name for a considerable time after the left the respondent's house, and what has happened or become of her since, he does not know; so that the *English* marriage act could never apply in this case, nor could any nullity possibly be declared on that account, because the parties lived together in *Scotland* as man and wife, in which the man's domicile was; so that living and cohabiting together as such in this kingdom, is sufficient without any ceremony; and therefore, though the marriage had been null by the laws of *England*, they were legally married by the laws of *Scotland*. But the respondent believes that this assertion is as void of truth, as many other facts thrown out by the petitioner, and which the respondent apprehends are altogether immaterial and inconclusive in this cause.

Upon the whole, your Lordships must observe, that the respondent hath been put to very great expence in this process, and though he should succeed in his cause, yet he does not know if he shall pocket one farthing of his just debt: This is, with submission, surely a very great hardship, and more so, if after the whole of the proceedings hitherto had, the respondent should be obliged to begin in effect *de novo*, and to enter into the proof of facts never before heard of, with which he has no concern; some of which are already disproved, and the whole of them appear, with submission, irrelevant and immaterial in the question. If your Lordships should be disposed to grant the proof craved, the respondent will humbly expect to be indemnified, in the first place, of every farthing he has hitherto expended; but as he flatters himself, that he hath shewn, to the satisfaction of the court, that he made these furnishings *bona fide* to Mrs. *Fen*, and that they were with the knowledge and approbation of her husband; so he cannot discover that the petitioner's alledgeances, supposing them proved, could have any sort of effect.

In respect whereof, &c.

DAV. ARMSTRONG.

The Lord advised

DECEMBER 19, 1768.

Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N
O F

JAMES FEA of *Clestairs*, and DAVID
LOTHIAN Writer in *Edinburgh*,

Humbly sheweth,

THAT, in the Action brought at the Instance of
James Donaldson, Linen-draper in *London*, against
the Petitioner, *Mr. Fea*, the Lord *Kennet* Ordinary,
on advising a Proof, adduced *ex parte* by the July 16th,
Pursuer, decerned for the whole Sums libelled, except an Ar- 1767.
ticle of 17 s. 11 d. *Sterling*;—and, after some other Steps of June 25th,
Process, his Lordship adhered to this Interlocutor, and found 1768.
the Defender liable in the Expence of extracting the Decreet,
but expressly *found no other Expences due, and decerned*.—And
afterwards, on advising a short Representation, respecting the
Form of an Affignation to a Bill to be granted by the Pursuer
to the Defender, his Lordship, at a Calling, ordered the Af- July 13th,
signation to contain Warrandice from Fact and Deed, and, 1768.
with that Variation, adhered; and the Defender having re-
claimed to your Lordships, you were pleased, on advising the
Petition, with Answers, to adhere *simply* to the Lord Or- Nov. 26th,
dinary's Interlocutors, and refuse the Desire of the Peti- 1768.
tion.

A

That,

Dec. 11th,
1768.

That, Mr. *Fea* having given in a second Reclaiming Petition, your Lordships were pleased, of this Date, to pronounce the following Deliverance thereon: “ The Lords having heard
 “ this Petition, in respect there are many of the Facts therein
 “ set forth, which are new, and were not formerly insisted
 “ on, though known to the Petitioner, decern the Petitioner,
 “ and *David Lothian*, his Agent, conjunctly and severally,
 “ on or before *Monday* next, to make Payment to the Re-
 “ spondent, *James Donaldson*, or *Andrew Dick*, his Agent,
 “ of ten Pounds *Sterling*, on their, or either of their Receipts,
 “ to Account; and, upon the said Sum being paid, appoint
 “ the Petition to be seen and answered, and the Answers to be
 “ given in to the Boxes on the 7th Day of *January* next, with
 “ Certification, that they will not be received thereafter, with-
 “ out an Amand of forty Shillings *Sterling*.”

As this Interlocutor bears hard on the Petitioner, Mr. *Fea*, imposes an unusual and extraordinary Hardship on your other Petitioner, Mr. *Lothian*, and may, in point of Precedent, affect the other Practitioners before the Court, the Petitioners cannot avoid bringing the same under the Reconsideration of your Lordships.

The Petitioners have already informed your Lordships, that the Lord Ordinary found the Pursuer entitled to the Expence of Extract, *but expressly found no other Expences due*: In this Judgment the Pursuer acquiesced; he never brought it under Review, either before the Lord Ordinary, or before your Lordships: The Judgment, therefore, in so far, is long since final. So standing the Case, the Petitioner, Mr. *Fea*, is advised, that, in point of Form, your Lordships could not have gone farther, when the Cause came to be advised, than to find (if the Defence had appeared litigious) Mr. *Fea* liable for the Expence of the Answers to his Petition; but your Lordships were pleased to adhere *simpliciter* to the Lord Ordinary's Interlocutors; and that Judgment, by the Acquiescence of the Pursuer, has likewise become final; so that the Pursuer cannot make any Demand for Expences hitherto in-
~~curred.~~

When

When the second Reclaiming Petition was moved, the Motive which seemed to incline your Lordships to order Mr. *Fea* to advance a certain Sum to the Pursuer, in the mean time, was, in respect that new Facts were set forth in the second, which had not been stated in the first, Reclaiming Petition. The Petitioners now hope to be able to satisfy your Lordships, that there were no new Facts advanced in this second Petition, such as should induce your Lordships to inflict this Censure, and that, even if the Defender had been culpable in this Respect, that the Clerk, in making out the above recited Interlocutor, has not properly (as your Petitioners are persuaded will be found to be the Case) carried into Execution your Lordships Intentions, at least *quoad* Mr. *Lothian*.

The Facts which your Lordships seemed to think were new, respected the Conduct of the Woman who assumed the Name of, and lived some time with, the Petitioner Mr. *Fea*, as his Wife. These Facts, in the first Petition were stated, in Substance thus : That this Lady, without any Provocation from the Petitioner, made an Elopement from him and went to *London*, and never afterwards returned to the Petitioner's Family, although he had been at Pains to reclaim her.—That after having deserted the Petitioner, she, in *May* 1766, was married at *St. Anne's Church, Soho*, to one Mr. *Sandford*, of which she acquainted Mr. *Fea*, telling him, that she desired him to shew that he had any Right to her.—That her Brother, *Richard Corbet*, and one Mr. *Cooper*, likewise acquainted Mr. *Fea* of this Lady's having married Mr. *Sandford*.—That a Trial ensued, and her Marriage with Mr. *Sandford* was found valid, and her pretended Marriage with Mr. *Fea* found void and null, and that the Pursuer, among others, had demanded Payment of his Claim from Mr. *Sandford*, and that Mr. *Sandford* had actually paid some of the Lady's Debts.—That, upon this Lady's first Arrival in *London*, *Richard Corbet* took Lodgings for her in *Cecil Street*, but that she was obliged to remove therefrom ; and it is frequently mentioned in the Petition, that this Woman had wrongfully, wilfully, and,

1st Petition, p. 1.

Do. p. 6.

Do. p. 7.

Do. p. 8.

1st Pet. p.
11 and 12.

and causelessly deserted Mr. *Fca*, and betaken herself to unlawful and irregular Courses ; and the Argument advanced for Mr. *Fca* was, that a Husband could not be made liable for Furnishings to his Wife, who lives a scandalous Life apart from him.

When stating these Facts, Mr. *Fca*'s Council did not trace this Lady's Conduct so very minutely in all the Circumstances of it ; but these great Outlines were distinctly stated, and it was thought would have conveyed an Idea of her Character and disorderly Behaviour sufficiently strong. But a Copy of the Answer to this Petition was transmitted to Mr. *Fca*, on perusing of which he wrote a Letter to his Doer, where the Lady's Conduct was a little more particularly traced, in order to obviate several Averments in the Answers, which were absolutely false in Fact ; and, in the second Reclaiming Petition, these Particulars of her Conduct were mentioned, which tended only to corroborate the Narrative of the former Petition ; for, surely, nothing could show more strongly this Lady's Prostitution, than her deserting Mr. *Fca*, living with, and afterwards marrying another Man. And even this Fact the Pursuer, in the Proceedings before the Ordinary, did not venture to deny he was absolutely ignorant of ; and, if he will speak out the Truth, it is believed he is not unacquainted with many of the other Particulars of her Conduct stated in the Petition.

When a Party is foreclosed by the Lapse of the Reclaiming Days, or two consecutive Interlocutors, his applying for an Alteration of the Judgment, upon Facts *noviter venientes ad notitiam*, may in many Cases justly subject him to make some Recompence to his Party for Expence formerly incurred : but, with all Submission, such Judgment would be very hard in the present Case, as Mr. *Fca*, within the Reclaiming Days, craved Review in the ordinary Form of a single Interlocutor of the Court, in a Cause where Expences had formerly been asked and refused, and the Judgment refusing Expences become final. And even, if any Expences were to be found

due

1 5]

due in a such a Case, the making the Payment of them a previous Condition of the Petition's being answered, must, with great Deference, be an additional Hardship, where the Party is residing at a great Distance, whereby he cannot have Intelligence of your Lordships Order in Time to comply with it; and consequently the Money must either be advanced by some Friend here, or his Cause be lost.

The Petitioners will now say a few Words as to the Form of the Deliverance on this last Petition, which subjects both the Petitioners, conjunctly and severally, in Payment of 10*l.* *Sterling*. It is hoped sufficient Cause has been shewn why Mr. *Fea* should not be subjected at present in Payment of this Sum. But even if your Lordships should be of a contrary Opinion, the other Petitioner, Mr. *Lothian*, must acknowledge he cannot discover any Principle in Law or Reason, on which he can be subjected in Payment of this Sum in the Character of Mr. *Fea*'s Agent; nor can he find in the Records of your Lordships Proceedings any such Precedent: And therefore was a good deal surpris'd when he found by the Minute-book, that he was decerned against conjunctly and severally with Mr. *Fea*, and thereby most improperly propoal'd as supposed wrongfully litigious in a Cause to which he was not so much as a Party.—Mr. *Lothian* cannot accuse himself of having in the smallest Respect been guilty of any Impropriety in conducting this Cause, and he is already considerably in Advance for Mr. *Fea*. If Agents or Lawyers are to be found liable alongst with their Clients in Payment of Sums decerned for Damages or Expences, these Gentlemen will stand on more slippery Ground than the Practitioners before the Court had ever Cause to imagine.

The Statute 1471, Chap. 49. declares, "That in Actions before this Court, the *Partie* that beis founden in the wrang and the Sentence is given against, shall pay the Expences of the *Partie* that winnis the Cause, be the Modification of the Lords." And the Act 1587, Chap. 43. intituled, *The Paine of malicious Pleyers*, declares, "That the

B

"maist

[6]

"main Part of the Lieges of this Realm are becom wilful, obstinate and malicious Pleyers," and therefore enacts, *inter alia*, "That he wha times the pley fall pay the Expences of the Party Obtainer of the Decreet, at the Modification of the Judge." And, *lastly*, the Statute 1696, Chap. 22. for preventing the Abuse of calumnious and malicious Suspensions, ordains, that when your Lordships find the Cause to be calumnious, you shall decern against the *Suspender* for the Chargers Expences, and that if the *Charger* shall be found calumnious or malicious, the *Suspender* shall have the same Justice. All these Statutes mention only the *Parties*; no Mention is made of their Agents or Procurators; and, indeed, without further Argument, it, with Submission, seems not a little adverse to every Principle and Form of Proceeding hitherto known in the Law of this Country, that any Person may be subjected to Expences in a Cause to which he is not a Party, or with which he is no otherways connected than as Agent. And therefore, as the Petitioner, Mr. *Lothian*, cannot find, that either by the Law or Practice of the Court, a Decree can go against an Agent for Expences found due by his Client, who is Resident in the Country at the Time; so he apprehends such a Precedent would be dangerous and alarming.

May it therefore please your Lordships to recal, or alter your Interlocutor of the 13th current, above recited, in so far as relates to Expences; and to find, that in this Case, there is no sufficient Cause for subjecting the Petitioner, Mr. *Fea*, in Payment of the 101. Sterling above mentioned; and therefore to allow his Petition to be seen and answered in common Form.—At any rate to find, That the Petitioner, Mr. *Lothian*, cannot be subjected in Payment of the said Sum, either conjunctly or severally, with his Client, or to give the Petitioner such other Relief in the Premises as to your Lordships shall seem meet.

According to Justice, &c.

JOHN DOUGLAS

*Recalled the Interlocut. so far as it
respects the Pet. Mr. Lothian*

20 9

TO THE RIGHT HONOURABLE,
The Lords of Council and Session,

T H E
P E T I T I O N
O F

ALEXANDER INNES of Cathlaw,

HUMBLY SHEWETH,

THAT the now deceased Alexander Innes, the petitioner's father, in the contract of marriage betwixt him and his first wife Margaret Heriot, the petitioner's mother, dated the 13th August 1708, bound and obliged him, his heirs &c. to employ the sum of 15,000 merks upon lands and other securities, whereof the rights to be taken in favour of himself and his spouse, and longest liver of them two, in liferent, and the children of the marriage in fee.

The contract further contains a clause, providing the conquest to the children, in these words: " Likeas the said Alexander Innes binds and obliges him and his forefairs, that whatsoever lands, heritages, annualrents, and others, he shall happen to conquest and acquire during the said marriage betwixt him and the said Margaret Heriot, he shall provide the samen, and take the bonds and securities to be made and granted therefor, to and in favour of himself and the children of the marriage; which failing, to his own nearest heirs and assignees whatsoever." In a subsequent clause, it is provided and declared, " ~~That the said A-~~lexander Innes shall have full power and liberty, at any time in his

“ his life, to divide and proportion what is hereby provided to the
 “ said children of the marriage, in such way and manner, and by
 “ such proportions, and with and under such conditions and re-
 “ strictions, as he shall think fit, *and that either by bond of provision
 “ or otherwise.*”

The marriage with Margaret Heriot dissolved by her death in the year 1730; at which time there were existing issue of the marriage seven children, viz. two sons, whereof the petitioner is the eldest, and five daughters.

During the subsistence of this marriage, Mr Innes, having been engaged in trade, and enjoying for many years a lucrative office, acquired the lands of Cathlaw, fundry houses and tenements in Edinburgh, and a considerable moveable estate; which subjects, therefore, the children of the first marriage were intitled to, under the clause above mentioned, providing the conquest of the marriage to them.

Mr Innes continued a widower till 1739; when, in the fifty-ninth year of his age, he married Isabel Inglis.

By the contract of marriage betwixt him and the said Isabel Inglis, he bound and obliged him and his heirs, &c. “ to pay to his said
 “ wife Isabel Inglis an yearly annuity of 1400 merks Scots, free of
 “ all cesses, &c. during all the days of her lifetime after his death:”
 And further obliged him and his forefairs “ to provide, and have
 “ in readiness, of his own proper means and estate, 16,000 merks
 “ Scots, and to add the same to the sum of 4000 merks belonging
 “ to the said Isabel Inglis, assigned by her to him, making in all
 “ 20,000 merks; and to take the rights and securities thereof to
 “ himself, and the said Isabel Inglis, in liferent, and to the chil-
 “ dren to be procreate between them in fee; and in so far as the
 “ annualrent of the said 20,000 merks shall fall short of paying
 “ her said annuity, he binds and obliges him to make up the defi-
 “ ciency out of his lands and effects.” The said contract further
 contains this declaration: “ But in case the said sum of 4000 merks
 “ of portion shall not be actually received by the said Alexander
 “ Innes, then not only shall the said annuity provided to the said
 “ Isabel Inglis suffer a diminution equal to the interest of the said
 “ 4000 merks, or of as much thereof as shall not be so received,
 “ but also the obligation on the said Alexander Innes to employ
 “ the fee of the said 4000 merks to the children of the mar-
 “ riage, shall cease and determine, and become void and null.”

Although

Although by the contract of marriage 4000 merks had been provided of tocher; yet it is an admitted fact, that no more than 1000 merks was ever recovered by Mr Innes. In the case, therefore, that the father should not acquire a separate estate during the marriage, and that these provisions should fall to be a burden on the conquest provided to the children of the first marriage, they were certainly sufficiently adequate to the petty sum he got with his wife, and all that his circumstances could afford.

This seems to have been Mr Innes's own sense of the matter; as appears both from the marriage-contract itself, and from the distribution he afterwards made of the conquest among the children of the first marriage. In this distribution, the plan which it clearly appears Mr Innes had in view from the beginning was, that the petitioner, his eldest son, should succeed him in the whole heritable subjects conquest during the marriage with his mother, and in what of the moveables should remain after having given sums of money to the younger children of the marriage.

For this purpose, although it was declared by the marriage-contract, that the securities for the subjects conquest during the marriage should be taken to the children thereof, yet the rights to the houses and tenements above mentioned, which were a considerable part of that conquest, were taken by Mr Innes to him and his heirs in general, thereby settling the succession of them on the petitioner, his heir at law in these subjects.

In like manner, upon the 30th January 1740, Mr Innes, upon the narrative of love and favour, and "*in implement and satisfaction pro tanto to the petitioner, his eldest son, of the provisions conceived in his favour by the contract of marriage between him and Margaret Heriot, his then deceased spouse, dispones to his said son, and his heirs therein mentioned, all and whole the lands of Cathlaw, and others therein mentioned; but reserving to him his own liferent right and use of the said lands; except in the case that the said Alexander Innes, his eldest son, should happen to marry while his said father was in life; in which case his liferent-right should cease and determine upon the day of his marriage, and his right to the fruits and rents thereof should thereupon commence.*"

Of the same date, Mr Innes, upon the narrative of love and favour, assigned and disposed to the petitioner the whole moveable goods and gear that should belong to him at his death.

These

These two deeds were delivered to the petitioner in the year 1742; and upon the day of his marriage, which happened in the year 1742, he entered into the possession of the lands of Cathlaw, which he has ever since continued.

As to the other children, Mr Innes settled upon them such provisions, and proportions of the conquest, as he thought reasonable: and as he had reserved to himself to exercise this power, "*by bonds of provision or otherwise*," so he did not follow the same form throughout, in granting these provisions to his children: for to his second son William, and to the heirs of his eldest daughter Grizel, who had died without receiving any thing from him, he had given off their shares, without taking any receipt or discharge; but his other four daughters being married, and their husbands alive, he had thought it necessary to take discharges from them and their husbands.

By these means, therefore, the settlement of the conquest in favour of the petitioner, was disburdened of the provisions to the younger children of the first marriage; and, as will afterwards be shown to your Lordships, his father did, many years after his second marriage, consider the petitioner as the person that was to succeed to the remainder of his effects.

Mr Innes, however, by the importunities of his second wife, did, at different times, make incroachments upon the conquest of the first marriage, in favour of her and her children.

It has already been observed, that Mr Innes was possessed of a considerable personal estate at the death of his first wife. Part of this money he uplifted during the subsistence of the second marriage, and laid out in purchasing houses and tenements in Edinburgh, which he disposed by the several deeds to be now mentioned in favour of the second marriage.

Thus, on the 24th August 1747, he disposed to his children of the second marriage, a dwelling-house belonging to him in the Cowgate: Mr Innes, in like manner, did, upon the 26th August 1747, dispose to the said children a tenement of land in Borthwick's close; upon the 16th July 1759, he likewise disposed to them a lodging in Blackfriars wynd; and, by some other deeds, unnecessary to be particularly mentioned, in the year 1753 he conveyed to them his share in the Edinburgh sugar-house, and all gold and silver, bank-notes, and other current specie of ready money, that should be found lying by him or in his custody at his death.

The defenders, however, did not rest contented with so many provisions

visions in their favour: nothing less would suffice, than carrying off the whole of the subject provided to the children of the first marriage; and an opportunity occurred in the latter period of Mr Innes's life for executing this purpose.

Mr Innes, a short time before his death, when now an old man of eighty-four years of age, was struck with a fit of the palsy, by which he was for some time rendered totally insensible. His memory and judgement had formerly been decaying; and this distemper, as might naturally be expected at his age, hastened the decay of nature; so that after this fit of the palsy, he seems to have retained scarce any use of his faculties. While in this situation, his wife and children have taken the advantage of him, to elicit a deed in their favour, directly opposite to all his former settlements, without the knowledge of any of his friends, or indeed of any other person, except Mr Charles Livingston, the writer of it, who is nephew to the defender Isabel Inglis, Mr Innes's second wife. Upon the death of Mr Innes, which happened upon the 14th March 1765, this deed was first produced, said to have been granted upon the 21st February 1764, whereby he disposed to his wife and children of the second marriage, share and share alike, "his whole houses lying within the city of Edinburgh, "and all other houses and moveables whatsoever, pertaining, or that "should pertain to him at the time of his death;" burdening them only with the payment of his debts, their mother's liferent, and an annuity of L. 108 Scots to the petitioner.

As the petitioner was, in this manner, cut out from those subjects to which he had right under the clause of conquest in his mother's marriage-contract, and other deeds above mentioned, he was advised to bring a reduction thereof before this court, upon the two following grounds: 1st, Because it contained subjects acquired during the subsistence of the first marriage, and was consequently *a non habente potestatem*; and, 2^{dly}, Because the same was granted by force of importunities, and at a time when the deceased Mr Innes was in a state of incapacity.

This process having come in course before the late Lord Nisbet Ordinary, a condescendence was given in by the petitioner; and his Lordship allowed both parties a proof of the facts set forth by them. It is needless to repeat the other steps or procedure; it will be sufficient to observe, that the cause was afterwards submitted to two Honourable arbiters; and that by a clause in the submission, it was agreed, that the proof led by authority of the arbiters, should be held as good

and legal evidence, if the parties should afterwards have occasion to resort to a court of law; that a proof was accordingly led; and that the submission having expired without any decret-arbitral being pronounced, the question came back before the court, and was remitted to Lord Ellick, in place of Lord Nilbet; that a further proof was thereafter allowed the defenders; that long memorials were given in upon both sides; and that the Lord Ellick Ordinary, upon the 26th July last, pronounced an interlocutor in the following terms, "Having considered this memorial for Alexander Innes of Cathlaw pursuer, with the memorial for Habel Inglis, and her children, defenders, together with the proof adduced by both parties, the several writs produced, and whole procedure in the cause, repels the reasons of reduction, assilizes the defenders from the whole conclusions of the libel, and decerns;" and that his Lordship adhered to this interlocutor upon the 13th December current.

Of this interlocutor the petitioner humbly craves your Lordships review.

And upon the first head of reduction, the argument maintained by the petitioner is, That the children of the first marriage, *qua* creditors in their mother's marriage-contract with the said Alexander Innes, had right to the whole conquest of that marriage: That the petitioner, upon the rights above mentioned conceived in his favour, is intitled to whatever subjects of that conquest were not particularly allotted to the other children of the marriage; and that he could not be deprived of this right by any gratuitous deed of the father: That this deed under challenge therefore falls to be reduced; as the only subjects conveyed thereby to his second wife and children, were conquest during the subsistence of the first marriage.

Against this ground of reduction, the first defence offered was, That the father was not tied up, by the above-mentioned clause in his first marriage-contract, from granting this deed, because it was in favour of the children of a second marriage; and that such provisions are to be deemed onerous deeds.

The petitioner does not dispute, that conquest provided to the children of the first marriage, may be burdened with moderate provisions in a second marriage contract. Neither does he quarrel those made to the defenders in his father's second contract. But after the provisions that were thought reasonable by both parties had been finally agreed upon and fixed by that contract, he apprehends that the father had no longer power to burden the rights of the

the first children with additional provisions. For although the conquest is subject to be affected by every onerous deed of the father, yet provisions to a second wife and children affect the conquest provided to the children of the first marriage on a very different footing of law from onerous deeds. It is more a matter of indulgence *ex gratia* to the father, than of right, an ease of a debt due to his children, his just and legal creditors in that conquest; which therefore, like every other privilege infringing upon the rights of third parties, your Lordships are never willing to extend. Hence it is, that although onerous deeds of the father are indiscriminately a burden upon the conquest, yet provisions of this kind have never been sustained but when they were moderate. Where-ever the father has possessed separate funds, relief has always been given upon these funds to the children of the first marriage whose provisions were affected. Neither has it occurred in any case, that where the conquest so provided must be burdened with provisions in a second marriage-contract, that the father has been allowed to make further incroachments by after deeds and settlements.

In this case, nothing can be more explicit than the condition of the marriage-contract, by which the provisions were declared to be in full contentation and satisfaction of all the wife *and children* could claim by or through Mr Innes's decease; and were so expressly accepted by her. It is true indeed, that Mr Innes might notwithstanding give away to them whatever subject he had an unlimited right over: but he is here disposing of a subject over which he had no such right, where a third party had a *jus crediti*, upon which the father had no other title to incroach, but what might be allowed for the purposes of a second marriage. When therefore he has so expressly declared in the marriage-contract what he judges will be necessary for all the purposes of that marriage, and the wife accepted thereof, the petitioner apprehends, the father is thereby debarred from any plea, on account of that marriage, for incroaching farther on the rights of the first children. He therefore imagines, that he is not obliged to enter into any intricate discussion with the defenders, whether they were well or ill provided by the marriage-contract; that his father could make no addition to these provisions, much less could he, by a testamentary deed of this nature, at one stroke disappoint the petitioner of the whole.

But if this discussion is to be entered into, the petitioner hopes he will have little difficulty in satisfying your Lordships, that the provisions

visions in the marriage-contract were sufficient in the situation of Mr Innes, and that the giving away to these defenders the whole of the subjects provided to the petitioner, cannot be justified on any plea of law or favour.

In judging of this matter, the question before your Lordships is not, Whether the wife and children were to be put in easy circumstances? The whole fortune of Mr Innes, in the ideas of some people, would have scarce been sufficient to provide one child. But it has always been a rule with your Lordships, in such cases, to consider, that the father is taking away a right legally established to his child of the first marriage; and therefore you have never allowed such incroachment to be carried further than necessity required. If your Lordships shall consider these provisions of the second marriage-contract upon this principle, as taken out of subjects to which the children of another marriage had the just right, he imagines they will appear fully sufficient. That Mr Innes should not only increase these provisions out of that subject, but give it away entirely from those who had the right to it, can never be justified as rational and moderate, whatever may be the particular sum that any one of the defenders receives thereby.

That your Lordships may perceive the exorbitance of these provisions, the petitioner has annexed three states of his father's affairs, to which he begs leave to refer.

From examining these, it will appear, that valuing the lands of Cathlaw at the price at which they were purchased, Mr Innes's subjects, at the dissolution of his first marriage, amounted in value to L. 5607; that the sums paid, and the subject disposed to the children of the first marriage, including Cathlaw at the same value, amount only to L. 2293; and that the funds, after deducting the debts, to which the children of the second marriage will succeed, if this deed is to be supported, will amount nearly to the sum of L. 3400, the whole of which must come out of the subjects conquest during the first marriage.

Thus your Lordships see, that that part of the subjects of which the children of the first marriage are deprived by these provisions, and this deed, are much more considerable than that which they have received; so that in fact the conquest of the first marriage may properly be said to be settled on the wife and children of the second marriage; and that the children of the first marriage are only getting moderate provisions out of that fund, the whole of
which

which they were intitled to claim as a just and legal debt. The petitioner's mother was almost nothing better provided in her contract of marriage for her and her children, than Isabel Inglis this defender. She by her œconomy was enabled to save a fund for her children, which, on the faith of her marriage-contract, she thought perfectly secured to them. Now that she is dead, it is submitted to your Lordships, whether it is consistent with justice or equity, that her children should have so large a proportion, near to two-thirds of the whole of this fund, carried off from them, because another wife had not been equally frugal and provident to place her children in circumstances equally good.

The defenders, sensible that this deed could not be supported on any footing of law or equity, as moderate or rational, have raised several objections to the petitioner's right, under the clause of conquest and the deeds above mentioned, to the subjects therein conveyed. These objections the petitioner shall state to your Lordships in order.

1mo, It was above mentioned, that four of Mr Innes's daughters being married, at the time he gave them off their provisions, he had taken discharges from them and their husbands for these provisions, although he had not observed the same form with respect to his other children. This the defenders have lately taken hold on to maintain, that by these discharges their father had acquired a power to dispose of the conquest at his pleasure.

As to the general point, Whether discharges by children to their father of their provisions by the marriage-contract, are to operate in favour of their father, or the other children of the marriage? the petitioner will not trouble your Lordships with repeating the arguments which have been so lately under your consideration in the case of Sinclair of South Dun. He must, however, be permitted to observe, that if the judgement of the court in that cause could apply to cut out his right, it would be the strongest instance of those bad effects which it was apprehended might ensue from supporting transactions of this kind to operate in favour of the father. It would be an example of that very case, which some of your Lordships suspected would one time or other occur, of a father, at the importunities of a second wife, and in order to gratify her avarice, falling upon this device, to defraud his children of the first marriage.

But whatever may be your Lordships opinion on this general
C point,

(15)

point, the petitioner apprehends that it cannot go the length to cut out his right to the subjects in dispute. For this purpose he begs your Lordships attention to the circumstances of Mr Innes, and the state of the conquest at the time these discharges were granted.

It has been above mentioned, that the conquest consisted of, *1mo*, The estate of Cathlaw ; *2do*, A moveable estate ; *3tio*, Several houses and tenements in Edinburgh.

As to the latter part of it, the houses and tenements, it has likewise been taken notice of, that the father had taken the original rights of these subjects to heirs whatsoever. The petitioner apprehends, that the taking of the rights in this manner did import an allotment of these subjects of conquest to him. His father might no doubt have revoked this allotment, by settling these subjects on any of the other children ; but in as far as they were not actually so settled, they must fall to be considered as part of that share of the conquest which the father had allotted to the petitioner.

The petitioner does not know whether the defenders will deny his position, that the taking these rights in this manner did import an allotment of the subjects to him ; but it does not seem to admit of any doubt. His father, by the marriage-contract, was bound to take the rights to the heritages, &c. conquest of the marriage, to the children thereof. But although he could not take these rights to any other except a child of the marriage ; yet, in consequence of the power of division which he had reserved to himself, he might have given these subjects to any one child exclusive of the rest. The taking the rights to such a child originally, was evidently the same thing as if they had been taken in general at first, and allotted afterwards. Neither was there any manner of difference betwixt providing these subjects to the petitioner *nominatim*, or providing them to his heirs whatsoever ; because the petitioner was his heir in subjects of that nature. And this very point was under your Lordships consideration, in the case of Campbells *contra* Campbells, 16th December 1738, where the case was exactly similar, of a father under an obligation of conquest to the children, who took the rights of a land-estate, the only subject conquest, to heirs whatsoever. Your Lordships found, That he might and did thereby allot that estate to his eldest son ; although your Lordships afterwards reduced that deed, because no provisions had been made to the younger children.

As to the other subjects of the conquest, it is an admitted fact, that

(11)

that the estate of Cathlaw had been given off irrevocably to the petitioner before these discharges were granted. And the father had likewise settled on him the moveables at his death, by the general disposition thereof above mentioned.

The petitioner therefore apprehends, that in this situation of the conquest settled at the time by these deeds of the father, on the petitioner, discharges by the other children of the marriage can operate no further than to the extent of the subjects discharged.

And your Lordships will observe the difference betwixt this and the late case of Sinclair, or that of Allardice. For here it is not necessary for the petitioner to say, that these discharges are to operate in his favour, or to convey any right to him, as it was for the children in the case of Sinclair. He has a right to claim these subjects upon the deeds by his father above mentioned, allotting them to him. The father indeed might have revoked that allotment, and given these subjects to his children of the first marriage. But the petitioner apprehends, that as long as they stood settled on him, it was not from the other children, but from the petitioner alone, that his father could be discharged of his obligation in his marriage-contract, or acquire a right of disposing these subjects at his pleasure.

There occurs no principle on which it can be maintained, that a discharge by one child, even allowing it to import an assignation of that child's right, can convey to the father an absolute power over subjects of the conquest, at the time provided and allotted, either by law, or by the father himself, to another child.

Your Lordships will observe, that the question, To what extent the discharge shall operate? is very different from the other, In whose favour it shall operate? Both in the cases of Sinclair and Allardice, it was argued separate and distinct from the other general point. Indeed the extent of the discharge cannot be fixed by any general rule, but must be gathered from circumstances. Supposing the father of two children has already allotted to the eldest two thirds of the whole conquest; afterwards, upon giving a sum of money to the youngest, he obtains a discharge or assignation *to what he can claim*; it could no surely be said, that this was any more than a third of the whole, or any thing further than a transaction for conveying that third.

In the case of Sinclair, there had been no particular allotment by the father of the subjects in dispute, at the time the discharges were

were granted: as the father had in no shape declared how they should go, the division of law, which, on the death of the father, would have given to every child an equal share, fell to be the rule; and on that medium your Lordships might interpret the discharge by the child *of her share*, to extend to an equal share of the whole. But on the same principle, if there had been a subsisting division by the father at the time, by which that child was only intitled to a half of the share which the law would have given him, it does not appear how your Lordships could have interpreted the discharge by the child to have extended further than to that half. For where an actual division of the subjects by the father subsists, there is no longer room for supposing a division by law, or considering that as the rule by which the discharge is to be interpreted: as the division of law must give way to the allotments of the father; the father, therefore, in order to be relieved of the obligation of conquest in any of the subjects settled by him on any one child, must acquire the right, whether by discharge or assignation, from the child to whom he has provided them. It seems absurd to say, that an assignation, much less a discharge, from any other child, could give him such a right, unless he had previously revoked his former settlement, and either left his division to law, or settled them upon the child with whom he transacted.

The decision in the case of Sinclair supports what is here maintained. If the petitioner understands the import of that judgment aright, it amounts to this, That a child, who is at the time allotted to a particular share of the conquest, either by law or the destination of the father, (for that can make no manner of difference), may assign and convey the subjects thereof to the father, so as to take away his obligation in the marriage-contract to convey them to the children of the marriage, and that a discharge implies such a conveyance. Upon the footing of this decision, the petitioner subsumes, and says, That his father had allotted to him the subjects in question; and as long as that allotment was not revoked, he, and none other of the children, had the right of conveying an unlimited power over these subjects to the father, or discharging the obligations of conquest as to them: but as he never has granted such discharge or assignation, he apprehends his right cannot be affected by the present deed, bestowing without his consent these subjects,

subjects, while allotted to him, upon those who were not children of the first marriage.

On these principles, the petitioner maintains, That the discharges cannot be understood as any thing more than disburdening the subjects conquest of the provisions designed for the younger children, to the extent of the sums and subjects discharged; and that they could not convey to the father subjects allotted to him while that allotment subsisted.

2do, It was averred by the defenders, That the conquest of the first marriage had actually been distributed among the children thereof. In order to make out this, the defenders mentioned, first, That from the time the provisions were given off to the petitioner and the other children of the first marriage, the rents and interests thereof were to be imputed in extinction of the obligation of conquest. But the petitioner apprehends, that this cannot be at all admitted to take off the obligation of conquest. It may be true, that the father had the power of giving the subjects conquest at any time, or retaining them, during his life; and in that way he might have enjoyed the life-rent of them. But his giving part of them sooner or later, cannot extinguish the obligation to provide the whole of them to the children. Your Lordships will observe the nature of the obligation from the clause of conquest, "That whatever lands, &c. should be conquest during the marriage, the rights thereof should be taken to him and the children thereof." If the obligation in the contract had been a sum of money in general provided to the children, the argument of extinguishing it, by rents and interest received, would have appeared more specious; but the obligation here is specific, That all lands and heritages conquest during the marriage shall go to the children. It is therefore the very individual lands and heritages conquest to which the children have right; and whatever rents or advantages they have received from one subject, cannot take away their right to every other. It is an absurdity to maintain, that the subjects conquest have been all disposed of to the children of the first marriage, when there actually remain subjects at the time of the father's death, confessedly acquired during the first marriage, which they have not received.

The defenders further maintained, in order to show that the conquest was exhausted, That moveables were not included in the clause of conquest; that the words *lands, heritages, annualrents, and*

(174)

others, could not comprehend moveables; and in support of this plea, reference was made to a decision, February 1673, Robertson *contra* Robertson, where a clause of conquest providing to the wife the liferent of all lands, annualrents, goods, and gear, during the marriage, was found not to extend to bonds, unless the wife could prove, that they came in place of, and were purchased by the goods and gear acquired during the marriage. But this decision will not avail the defenders in the smallest degree, as this was in effect only finding it incumbent upon the wife to prove, that the bonds were really conquest and acquired during the marriage. At the same time, though it should be granted, that if no other words had been used to express Mr Innes's intention than those above mentioned, moveable bonds would not have been comprehended under the provision of conquest; yet the matter is put beyond all doubt by the subsequent words of the clause, where he obliges himself to take *the bonds* and securities to be granted therefor, "to" and in favour of himself, and the children of the marriage," &c. which clearly point out, that as the words *lands, heritages, annualrents, and others*, are, in the common acceptation of language, broad enough to comprehend every thing to be acquired by him; so he never meant to make a distinction betwixt heritable and moveable subjects.

Many extravagant articles were stated in this account, in order to make it out, that the conquest had been already bestowed on the children of the first marriage. Thus the rents of the estate of Cathlaw were charged at L. 100 *per annum* from the time the petitioner had got it off, although they were then no more than L. 50 a-year; and although it appears from the proof brought on the part of the petitioner, that any additional value is entirely owing to the inclosures and improvemens that have been made by himself since he entered into the possession. The estate itself likewise was valued at L. 3738, although his father paid only L. 1027 for it. In order to ascertain its present value, a proof had been allowed by the Lord Ordinary; upon which they caused two farmers in the neighbourhood of Edinburgh inspect the grounds, a considerable part whereof are in the petitioner's own possession: And according to the report of these farmers, they bring out the free rent to no less than L. 118 : 11 : 1, which being valued at twenty-nine years purchase, and including L. 300 as the worth of the house, produces a capital of L. 3738 : 1 : 5. But the witnesses adduced on the part of the petitioner, who are
persons

persons of skill in that part of the country, and must therefore be better acquainted with the nature of the soil, instead of L. 118, 11 s. 1 d. estimate the yearly value at no more than L. 72 : 18 : 9.

But be this as it will, the petitioner, with submission, apprehends, that it can make no variation in the argument: for if the defenders are pleased to value the lands of Cathlaw at so high a rate, they must put the same value upon them at computing the amount of the conquest acquired during the subsistence of the first marriage.

Upon the whole, therefore, the petitioner hopes he has been able to satisfy your Lordships, that the deed challenged falls to be reduced, as gratuitously disposing of subjects to which the petitioner had right under the above-mentioned clause of conquest, and the other deeds in his favour. The petitioner indeed does not believe, that his father would ever have granted such a deed, to disappoint him of his just right, while he retained his faculties, and knew what he was about: but advantage had been taken of him when in a state of imbecility and incapacity.

The petitioner shall therefore next proceed to his second and separate reason of reduction, That the deed in question was not a deliberate act, but the mere effect of imbecility and undue sollicitation.

The petitioner is sensible how ungracious a task it is, for a son to rip up the frailties of his father; and it is with the greatest reluctance that he enters upon this task: but he could not, in justice to his family, have allowed these defenders to carry off, unquarrelled, so considerable a subject, out of which his children would have been provided, and which had been settled and secured upon him and them by so many different deeds. He knew likewise how contrary it was to the real inclinations of his father, to violate these obligations, or to deprive his son's family of this fund for their provisions. He had good reason to be satisfied, that these defenders had taken an undue advantage of the opportunities which their situation allowed them, in imposing upon the imbecility of his father's old age, to impetrate a deed contrary to what his own reason and inclination would have dictated. The petitioner's being obliged, therefore, to enter into this proof, and now bringing it before your Lordships, must be imputed to the rapacity of these defenders, who were not satisfied with the provisions settled on them by the marriage-contract, nor with so many additional provisions

vifions incroaching on the petitioner's right, but attempted, by this deed, to deprive him of the whole.

The defenders have founded much upon the prefumption of law, That every perfon muft be fuppoted capable, and every deed held to have been freely and fairly executed, unlefs the contrary are proved. The petitioner does not deny the general principle; but he apprehends that this prefumption may be weakened, if not entirely taken away, by circumftances arifing from the nature of the deed, or the conduct of thofe to whom it was granted. From thefe, prefumptions of imbecility and impofition may arife ftill ftronger than the prefumption of law; and the petitioner apprehends, he will have little difficulty in fatisfying your Lordfhips, that the nature of the deed under challenge, and the conduct of the defenders, do fubject it to fuch prefumptions, independent of pofitive proof; for not only was this latent deed executed in a clandestine manner, without the knowledge of any of Mr Innes's friends, but the petitioner fhall likewife make it appear, that it was contrary to the moft deliberate prior fettlements and refolutions of Mr Innes: And if this is found to be the cafe, the petitioner apprehends it muft make the proof of aétual imbecility and impofition much the more credible to your Lordfhips, and indeed relieve him greatly of the load of that proof, and throw it upon the defenders.

Upon this head of reduction, therefore, the petitioner fhall endeavour, *1mo*, to fatisfy your Lordfhips, that this deed, contrary to the obligations of his marriage-contraét, was likewife directly contrary to all the previous purpofes and intentions of Mr Innes, and even to what he had exprefsly declared a very fhort time before the date of it. He will then proceed, *2do*, to ftate to your Lordfhips, evidence, from which it will appear, that from a period previous to the date of the deed in queftion, his father's memory and judgement were, and continued to be, greatly impaired; and that his imbecility and incapacity were not only conspicuous to thofe about him, but alfo acknowledged by the defenders, his wife and children, living in the houfe with him. *Laftly*, The petitioner fhall take notice of the undue follicitations that were ufed, and the clandestine manner of executing this deed.

Upon the *fiift* of thefe heads, there is the ftrongeft evidence.

The petitioner has, in the former part of this petition, ftated to your Lordfhips the different deeds executed by his father in his favour. Although, however, by thefe deeds, his father had fettled

his

his succession upon him, yet your Lordships will observe, that the only estate which he gave off to the petitioner during his life, was that of Cathlaw. The fact was, that the old gentleman intending the petitioner for his heir, bred his younger brother to business, and gave him a sum of money : but in order to induce the petitioner to marry, and reside in the country, he settled this estate of Cathlaw upon him; into the possession of which he was to enter on the day of his marriage. As however that estate was no more than L. 50 a-year, it could never have been any inducement to the petitioner to settle with a family, if he had not received the strongest assurances from his father, that he was to be his heir, and that he never would alter the deeds in his favour; otherwise indeed his father could not have fallen on a method, in all probability, more effectually to ruin the petitioner his son, considering the smallness of the rent.

Accordingly, the petitioner's father was always sensible of his obligation, both in justice and humanity, to make him his heir; and that he could not, consistent with either, put his estate past him. His disposition to the estate of Cathlaw, declaring it only to be *pro tanto*, and the disposition to his moveables, clearly discover his purpose at that time. That he remained in the same sentiments as far down as the year 1758, appears likewise clear from a deed, dated the 18th of June 1753, and a docket, or codicil, annexed thereto, upon the 18th July 1758. By this deed Mr Innes confirms his contract of marriage with his spouse (*in omnibus*) Isabel Inglis, &c. and the deeds above mentioned in favour of the children of the second marriage previous thereto; and also an assignment by him in favour of William Innes his second son of L. 100 Sterling bond; and which assignment declares the same to be in full satisfaction, with what he had formerly received from his said father, of all patrimony due to him in and through his mother's contract of marriage, or otherwise. Then is added the following remarkable clause: " And in regard I paid no tocher and
 " portion to Grisel Innes, my eldest daughter, now deceased, and
 " so resting the same; therefore I hereby ordain and appoint
 " L. 2000 Scots money to be made forthcoming, by my *eldest son*
 " and heir, *Alexander Innes of Cathlaw*, and his heirs, to her three
 " children, my grandchildren, Alexander, Davida, and David
 " Littlejohns, to be applied and paid by him and them towards
 " the said three childrens education and sustenance, and binding
 E " them

" them to trades or employments, for gaining their livelihood in
 " the world, as shall be judged rational and conducive for that
 " purpose: and in case of his decease, by his heirs, &c.; and
 " declare the same to be my last will and testament; *injoining my*
 " *said eldest son and heir, Alexander Innes of Cathlaro, to the obser-*
 " *vance and fulfilment thereof, as far as concerns him, and as he tends*
 " *the happiness of his family; which I heartily wish, committing him*
 " *and all his posterity to power of grace,"* &c. By the docket or co-
 dicil, which is also holograph of Mr Innes, he thereby appoints a
 deduction to be made by his also forenamed son *Alexander Innes of*
Cathlaro, out of the forementioned tocher of L. 2000 Scots, of all
 money, or sums of money, which he had then paid out, or might
 thereafter pay out, for his said three grandchildren behoof.

Thus by this deed he deliberately acknowledged the petitioner
 as his heir; and in that light burdens him with a provision to a
 younger child, and three grandchildren, which he otherwise could
 not do. But what is of still more consequence, at a much later
 period, and as late as the year 1763, but a very few months before
 the date of the deed under challenge, it as certainly appears, that
 he remained in the same mind, and still continued to consider the
 petitioner as his heir. Thus Agnes Bell, after mentioning her
 mother's desire to have a tack from Mr Innes of the house she pos-
 sessed, depones, Purf. proof, p. 11. E, " That for this purpose she
 " heard her mother have a conversation with Mr Alexander Innes,
 " as she thinks in the 1762; and the deponent has also spoken
 " to Mr Innes to the same effect, desiring that he would annul Mrs
 " Cowan's tack, and give the deponent's mother a tack for the
 " space of nine, twelve, or nineteen years; and as a reason for
 " urging this, the deponent's mother said, He was a very good
 " landlord, *but they did not know if Mr Innes's successor might be as*
 " *good a one:* That Mr Innes refused giving any tack, and said,
 " They had no occasion to fear, *for his son was a very good lad, and*
 " *he had a numerous small family.* Depones, That since the 1762,
 " the deponent has more than once taken occasion to speak to Mr
 " Alexander Innes to purchase a shop which was possessed by Mr
 " Charles Innes as a tenant, for the behoof of Mr Charles; and
 " the arguments the deponent used were, That as he, Mr Alexan-
 " der Innes, was a monied man, it was a pity to allow Mr Charles
 " to pay so high a rent for that shop as a tenant: That Mr Innes
 " seemed angry at this, and said, He would buy him no such shop; *for*
 " *that*

“ *that he had given him a stock, and set him up in trade; and that he, Mr Alexander Innes, had a great many to provide for, and his son had a numerous family.*” It is to be observed, that these expressions can only refer to the petitioner, as he is the only son of Mr Innes who is married, and has a family. And Mr Innes’s real sense of his obligation in justice not to disinherit the petitioner, appears strongly from the deposition of Margaret Gray, a maid-servant in the house from Whitsunday 1762 to Whitsunday 1763, p. 31. E, Purf. proof. She depones, “ That one day when she was in the fore-said service, coming out of the kitchen, Mr Innes and his wife being then in the fore-room, and the door open, she heard Mr Innes saying to his wife, *I will not wrong the children of my first marriage, for I got nothing with you; and he seemed to say this with an angry tone*: And the deponent remembers this particularly; for Mr Innes had before been washing his hands, and was at that time wiping himself with a towel.” Here your Lordships have evidence of the importunities used with the husband to disinherit his son, and his resolution at that time not to listen to them. It cannot be doubted, but many more of the same kind have passed, although it would be difficult to discover them, as solicitations of this kind are generally at seasons when witnesses are not admitted; and women who impetrate deeds of this kind, well know that they are then most effectual.

The intention of the father at this time, is further clear by a scroll of a deed, holograph of Mr Innes, wrote posterior to the 7th of June 1763, which shows, that he, at that time, entertained no notion of making any further provisions to the children of the second marriage than he had already executed in their favour. This scroll is conceived in the following terms. “ I Alexander Innes of Cathlaw, for certain good and necessary considerations, do hereby appoint and ordain, that all my sons, brothers of this my present marriage with Isabel Inglis my wife, be immediately, after my death, equally interested and concerned in all and every one of my houses belonging to me within the city of Edinburgh, *purchased and acquired by me within the time of my present marriage with Isabel Inglis my spouse*; and that they intromit with the rents thereof annually and termly as they shall fall due, for their subsistence and maintenance, all the days of their lives; and do hereby confirm to the said Isabel Inglis her jointure contained in the contract of marriage with her, and to be paid her
“ accordingly;

“ accordingly; and that all my said sons do equally contribute to
 “ the necessary expence for keeping the said houses habitable, from
 “ time to time, namely, Charles, George, David, Archibald, Gil-
 “ bert, and James. In witness whereof, I have written and sub-
 “ scribed these presents at Edinburgh, the”

This scroll indeed bears no date; but that it was wrote posterior to the 7th June 1763, though how long it is impossible to say, is perfectly clear from this circumstance, that it is wrote upon the back of a burial-letter bearing that date.

From the whole, it appears, that as late as a few months before the date of this deed, the firm purpose of the petitioner's father was not to wrong him even so far as to make additions to the provisions of his second wife and children, and that he had declared this purpose when solicited by his wife to the contrary. A deed, therefore, immediately thereafter, disinheriting his son, directly contrary to his declared intention, must beget suspicion, when your Lordships are likewise acquainted, that Mr Innes was at this time eighty-four years of age; a time of life when few men retain the same firmness, and use of their faculties, as formerly, and that the deed in question was executed in a most clandestine manner. Many circumstances will be mentioned in the sequel, with regard to the undue manner in which the deed was obtained; but on this argument it will be sufficient to observe, as a fact that must be admitted by the defenders, that the only persons in the knowledge of this deed when executed, were Isabel Inglis the defender, and Charles Livingston her nephew, whose conduct in this matter shall afterwards be taken notice of; that by them it was kept a profound secret from all Mr Innes's friends; nor does it even appear, that he ever gave the smallest hint himself to any person of his being in the knowledge of his having executed such a deed. Putting these circumstances together, of the clandestine manner in which the deed is executed, Mr Innes's extreme old age, and his deliberate purpose to the contrary when his judgement was entire, it is submitted to your Lordships, that a strong presumption must lie against these defenders, independent of all proof of imbecility and imposition, that they have taken the advantage of Mr Innes's frailty in the latter part of life, to prevail on him to disinherit his son, and to give his fortune to them. From his so long resisting their solicitations while his faculties were sound and entire, it is most probable he never otherwise would have been prevailed on to do it.

And this leads the petitioner, *2do*, to state to your Lordships the
 positive

positive proof he has brought of the failure of Mr Innes's faculties, and his imbecility, which must be strongly confirmed and supported by these presumptions arising from the deed itself; and which indeed, from the whole circumstances of the case, your Lordships can have little difficulty in believing.

In taking this proof, the petitioner did not rest satisfied with the general opinion of people who saw Mr Innes; he thought it would be more conclusive and satisfying evidence to your Lordships, to bring home this proof to a series of particular instances both before and after the granting of this deed in the most common and ordinary affairs of life, where Mr Innes had discovered a total failure both of judgement and of memory. The opinion of witnesses may be false or ill grounded; but as facts cannot lie, the petitioner shall only desire your Lordships to form a judgement from the facts he has proved, whether they were at all consistent with Mr Innes's possessing his faculties in any degree entire.

It will be observed, that Mr Innes had at this time given over all business; and except the drawing and discharging the rents of his houses, scarcely meddled with any other affairs. It cannot therefore be expected, that the petitioner should prove his incapacity of managing affairs of consequence and difficulty, because in fact he had none such to manage; but he apprehends, that it will be equally satisfying, if in those matters in which he was employed, it is found he discovered this failure of his mental faculties: nay, he apprehends a stronger argument may be drawn from these, than from matters of higher consequence; for, if in the simple and daily occurrences of life, he discovered want of capacity, your Lordships will not easily believe, that he could manage matters of more difficulty, which consequently required more capacity.

And the order in which the petitioner shall state his proof, shall be, in the *first* place, to mention several instances before and after the date of the deed, wherein Mr Innes discovered this failure of his memory and judgement: and although some of these may not appear to your Lordships at first sight of such moment, and did they stand single it might be doubtful whether they were to be entirely attributed to want of judgement and memory; yet the petitioner has stated them here, because he apprehends they are explained by the stronger instances which he has proved, which take away any dubiety as to what cause they are to be attributed, and leave no room to question, that they must have proceeded from the same cause with

(22)

the others, a failure of his mental faculties. And this will still be made clearer by what the petitioner shall, *secondly*, state from the proof, That to such a state of imbecility was Mr Innes reduced, that he was at different times unable to distinguish his children from one another; and that these defenders, his wife and children, made no scruple of acknowledging their opinion of his dotage and incapacity.

And upon the first of these heads, the first circumstance that shall be mentioned to your Lordships, is contained in the deposition of Janet Murray, spouse to Henry Cathrae, from whom Mr Innes was in use to purchase his candles, which he paid generally at the end of the year. After mentioning, that in November 1763, he had called at her husband's shop, and desired her to follow him home, Purs. proof, p. 23. D, she depones, "That accordingly he
" went to his house, and he was sitting at a bunker in his fore-
" room, with some money before him: That she thinks he had *just*
" a guinea in silver, besides some notes in his hand: That he al-
" ledged he wanted a shilling of his money, and was counting it over
" and over: That Mrs Innes went forward to him, and endeavoured
" to convince him, that he had his count, being twenty-one shillings;
" and for this purpose, she laid three five-shillings and one six-shil-
" lings together in separate parcels: and his son George likewise
" endeavoured to convince him, that he had his whole count: but
" still he persisted in averring, that he wanted a shilling; and he was
" not satisfied of the contrary when the deponent left the house."
The defenders wanted to explain this away, by saying, That such mistakes in counting were nothing uncommon. But this will not do the business: for your Lordships have the sentiments of this defender, Isabel Inglis, who was present at the time, and from seeing the manner in which it was done, could know whether it was a common mistake; yet she imputes it to a very different cause, and was of opinion it proceeded from a failure of Mr Innes's faculties, as appears from the after part of this witness's deposition: p. 23. H, depones, "That when the money was laid upon the table,
" as aforesaid, she always heard Mr Innes insist, that he wanted a
" shilling to make up the count of his guinea; and on this occasion Mrs
" Innes seemed very much concerned, that her husband could not com-
" prehend a thing that was obvious to every body, and wrung her
" hands, saying, She was sorry to see her husband in that way." But this is not all: for this witness further depones, p. 23. I, "That af-
" ter

“ ter getting payment of the account, as aforesaid, the deponent
“ was scarce got home, till she was followed by Mr Innes, who
“ told her, he was sorry to trouble her, but that he imagined he
“ *had given her half a guinea more than was due, in the payment of her*
“ *account*: To which she answered, We shall soon be satisfied of that,
“ for I have laid the money by itself; so took Mr Innes into a room,
“ and drawing out a shuttle in a desk where the money was laid,
“ again counted over the money in his presence; upon which he
“ seemed satisfied, and went away.”

The next circumstance is that contained in the deposition of William Ross painter in Edinburgh, Purs. proof, p. 8. H, “ Depones, That
“ he was in use to be employed by the deceased Mr Alexander Innes, to do any of his work as a painter, for about twelve or fourteen years preceding his death: That Mr Innes used to be very exact in his payments, immediately after the work was over: That in the year 1763 the deponent having executed some painting-business for Mr Innes, and for which he had gotten orders from Mr Innes to do, in presence of Mrs Innes, the deponent, after performing the work, thought that Mr Innes was not so punctual as usual: That upon this, as the deponent thinks, in the month of November 1763, he went to the house of Mr Innes with his account, which he presented to Mr Innes, in presence of Mrs Innes and their son Charles: That Mr Innes *denied he owed him any account; and said, he knew nothing either about him or his account*: That upon this the deponent began to argue with Mr Innes; but Mrs Innes, as the deponent apprehended, imagining that the old gentleman was *so frail that he should not be argued with*, said to the deponent, Give yourself no trouble, I know the account is just, and it shall be paid; and Mr Charles repeated the same thing to him; and the deponent left the account either with Mrs Innes or Mr Charles.” But what is contained in the after part of his deposition is still stronger, p. 9. B, “ That in about a month thereafter, the deponent went, being sent for, and got payment of his account: That Mr Alexander Innes paid the deponent the money in presence of Mr Charles, in a back-room, where Mr Alexander Innes’s closet was: That before giving the deponent the money, which consisted in bank-notes, Mr Alexander Innes *counted them very frequently over, and read them also over, and seemed particularly surprised at the optional clause in the notes*; which Mr Charles Innes explained to him, telling him, that at the end of six months, the sixpence
“ more

“ more in the twenty-shillings notes was due, after being marked
“ by the tellers in the bank: upon which Mr Alexander Innes
“ seemed satisfied, and paid the deponent the account, which the
“ deponent then discharged: That the account, to the best of the
“ deponent’s remembrance, amounted to about L. 6, 12 s.: That old
“ Mr Innes argued to have down the 12 s. and as the deponent
“ saw him to be very *fore failed*, and besides, as he had been a good
“ customer, did not chuse to have any words with him, and ac-
“ cordingly remitted the said 12 s.” It is impossible to account for
it, that a man who had been long in business, and had enjoyed an
office about the bank, should be ignorant that there was optional
clauses in bank-notes. This circumstance must convey the fullest
conviction, that at this time Mr Innes’s memory in matters with
which he was the best acquainted, and the most conversant in for-
merly, had entirely failed him. And here the common resource of
the defenders will not apply, That this mistake might be owing to
a weakness of sight. Another instance your Lordships have in the de-
position of William Young Smith in Bell’s wynd, p. 28. H. Further,
your Lordships have many instances in this proof, of his going and
demanding again the rents from his tenants, immediately or soon
after they had paid him. Thus Elisabeth Mercer, Purs. proof,
p. 21. B, depones, “ That she and her sister possessed a house which
“ belonged to the deceased Mr Alexander Innes: That they were
“ tenants in this house for five years, and only left it at Whitfun-
“ day last: That Mr Innes used very duly to come about at every
“ half-year for the payment of his rent, and as the deponent thinks,
“ among the last half-year’s rents that he uplifted, Mr Innes, a-
“ bout a fortnight, as the deponent thinks, *after the rent was paid*,
“ *again called at their house for the rent*; but upon his being told,
“ that the rent was paid, *he recollected their faces*, and so went off,
“ and told the deponent and her sister, that he had all the payments
“ of his tenants marked in his books at home; and the deponent
“ imputed this second demand of rent after it was paid, *to his old*
“ *age, and the failure of his memory.*” In like manner, Alexander
Simson, Purs. proof, p. 21. F; and William Simson, teller in the
Royal bank, who depones to a circumstance strongly indicative of
the failure of Mr Innes’s faculties, Purs. proof, p. 26. G, “ That he
“ and his brother Alexander Simson, the preceding witness, posses-
“ sed a house in the Old Assembly close, belonging to the decea-
“ sed Mr Innes late of Cathlaw: That the deponent remembers,
“ that

“ that one day, and from the receipt in process, now produced to him, thinks it was upon the 1st day of November 1763, the now deceased Mr Innes came to the deponent for the half-year's rent that was only payable at the Candlemas thereafter, though due at the Martinmas: That the deponent said, he had no objection at paying the rent; upon which Mr Innes began to write a receipt upon the end of the bank-table; but he stopped about the middle of it, and pointing out to certain words that he had wrote, *asked what they were?* and the deponent having told him, he then desired the deponent to begin and read it over from the beginning; and which the deponent accordingly did, as he thinks, six or eight times before Mr Innes would proceed to finish out the receipt.”

These instances all happened prior; but very soon after the date of this deed there appear in proof like instances of the failure of Mr Innes's faculties. Thus Agnes Bell mentions, that, in April 1764, Mr Innes came and demanded the half-year's rent from her mother that was only due at Whitsunday; and that she had much communing, Mr Innes having demanded first 40 s. and then 20 s. And depones, Purf. Pr. p. 10. H. “ And the deponent imputed the demand made by Mr Innes at this time, to be occasioned *through his old age, and failure in his memory*; for the deponent is persuaded, that if the good old man had been as he was in former years, he would not have been making such a demand from so good a tenant.” The same witness some time after mentioning that Mrs Cowan had left her house in Miln's square, and paid Mr Innes her rent, he some time thereafter came back to the house asking for Mrs Cowan, and was in a passion to hear she was gone away without paying her rent. Further depones, p. 12. E, “ And the deponent has sometimes met with Mr Innes upon the street, and has told him over and over who she was before he knew her.” The same circumstance of his calling for rents at an unusual time, and forgetting those with whom he was most intimate, appears from the deposition of Anne Hall, spouse to Robert Hutton, who had been eleven years his tenant: After mentioning that he had called for her rent some time before it was due, and insisted much upon having it, depones, Purf. Proof, p. 13. D, “ That about a year prior to Mr Innes's calling at her house as above deposed to, he, Mr Innes, came and called at the deponent's house; and her servant having taken him into a room, the deponent went to him; upon which Mr Innes asked the depo-

G

“ nent,

(25)

" nent, If she was ready for him? and the deponent perceiving
" that he was in a mistake, and that by this expression he was
" craving rent, told him, she imagined he was in a mistake; *upon*
" *on which he looked about the room in a strange way*, and then said,
" *Are not you Mrs Smith?* but the deponent having told him, that
" she dwelt in the other little court below, he upon this went off.
" Depones, That Mr Innes at this time, when he found himself
" in a mistake, asked, *Who lived below?* and she having told him
" that it was Mr Simson his tenant, he said no more, but went a-
" way; and on former occasions, when he had called at the depo-
" nent's house, he also would have asked her, *Who lived below?*"

Her husband Robert Hutton confirms her deposition, and adds, p. 14.

" E, That for about two years preceding Mr Innes's death, the depo-
" nent did not chuse to pay Mr Innes any money by himself, for he
" appeared to the deponent *impaired in his faculties*; and the depo-
" nent upon that account inclined to pay his rent to Mr Innes in
" presence of his wife and family. And depones, That several
" times, about two years preceding Mr Innes's death, down to the
" time above mentioned, when he called upon the deponent for
" his rent, the deponent has had occasion to see and to hear
" Mr Innes calling at the deponent's house, when he would ask,
" *Who lived below?* and where *Mr Smith lived?*" In like manner
Margaret Doret, servant to Mr Alexander Simson, mentions Mr
Innes's frequently calling at her master's house, though she can-
not exactly condescend upon the time. And depones, Purs. Proof,
p. 20. I, " But that she remembers, that upon the occasion of his
" calling at the house as aforesaid, he asked the deponent, *Who*
" *lived there?* and he also asked at her, *Who lived above?* and,
" *Who lived below?* and that she thinks he did this above two dif-
" ferent times; but when these times were, she cannot recollect."

William Innes, Purs. Proof, p. 15. depones to several very strong
instances of want of memory and surprising imbecility in Mr Innes.
This witness, a barber in Edinburgh, had been well acquainted
with Mr Innes, and had possessed a house of his for upwards of
thirty years. He says, That Mr Innes called once a-week to get
himself shaved; and one day in particular, about a year and a half
before his death, depones, Purs. Proof, p. 15. D, " He came to the
" deponent's shop; and after being shaved, and while his wig was
" a-dressing, he walked to the door of a back room, which being
" shut, he asked, *Who lived there?* and the deponent having an-
" swered,

“ fwered, that it was only a *back room in his house*, Mr Innes went a little further towards the back wall of the kitchen, and asked, *Who lived there?* and the deponent having answered, *that no body lived there, it was only a wall belonging to the house*, Mr Innes then came into the shop, and asked, *Who lived below?* That the deponent was surprised at this, and told him, that it was one of his own tenants; upon which Mr Innes put on his wig, and went off: And it appeared to the deponent that *his judgement was fore failed* by his putting all these questions.” And this is further confirmed by the depositions of Katharine Blair his wife, Purf. Pr. p. 16. E, and James Innes, p. 18. who further depones, p. 18. I, “ That the deponent imputed this *to his frailty and the wavering of his memory*: That the deponent cannot particularly confcend how long this was before Mr Innes’s death; but the deponent in general remembers, that Mr Innes *was frail* for some time before his death, and came to the deponent’s shop when the deponent did not think it so proper that he should be walking himself; and he remembers that for some time a boy attended him.” And afterwards, p. 19. B, That *by frail, the deponent means both with respect to Mr Innes’s body and mind, and what is commonly incident to old age.*”

It must strike your Lordships, as a strong instance of the failure of memory, and imbecility, that a person should again and again mistake his own houses, and forget the names of his tenants. These cannot be accounted common mistakes; nor did they appear so to the witnesses. A circumstance is mentioned by one of the above witnesses, William Innes, which paints out strongly that filliness and weak anxiety which is a very common attendant on the loss of faculties. William Innes, p. 15. G, depones, “ That Mr Innes paid always regularly for his shaving, three half-pence or two pence at a time. Depones, That after the circumstances above deposed to happened to Mr Innes, he was one day in the deponent’s shop, getting himself shaved; and upon taking out some half-pennies to pay for his shaving, he let some of them drop; upon which the lad gathered them up to him, and returned them. This happened before dinner; and after dinner Mr Innes returned, and asked, If he had dropped any money there that day? and upon being told, what he had dropped was gathered up; and also after again looking over the shop with a candle, for a candle had also been lighted at the
“ time

(25)

“ time the half-pennies were dropped, Mr Innes seemed satisfied, and went away, for he was a very exact man.” Further instances of his want of apprehension in the most common matters, and even not being able to distinguish persons he was well acquainted with from one another, appears from the evidence of James Swan, journeyman to the above William Innes barber, who depones, Purf. proof, p. 14. H, “ That the deceased Mr Alexander Innes generally used to come to their shop to get himself shaved; and as he liked the deponent best as a shaver, he used always to call for him for that purpose; but there was another young lad in the shop, one *John Sharp*, much about the deponent’s size, at that time, who has told the deponent, that he has sometimes deceived Mr Alexander Innes when the deponent happened to be out of the shop; and when Mr Innes called for the deponent to shave him, that *Sharp* has pretended that he was the deponent, and so shaved Mr Innes without his discovering the difference. Depones, “ That there was another lad also in the shop, of the name of *Watson*, much about the size of the deponent as to stature, but was grosser in his make. Depones, That he shaved Mr Innes to the time of his death; and in the winter preceding that time, he went to the house of Mr Innes for that purpose; and that the said *John Sharp* told the deponent, that when Mr Innes had come to the shop, as above mentioned, to be shaved, that *Sharp* had more than once personated the deponent.” And *John Sharp*, p. 17. B, confirms what this witness says; and that both he and *Watson*, another journeyman, were in use to call themselves by *Swan’s* name, and shave Mr Innes; and depones, “ When Mr Innes had called for *James Swan*, and the deponent had come forward to him under that name, he would have clapped the deponent on the shoulder, saying, *Come away, Jamie, my man, and take care, and shave me well*; and at this time the deponent was taller than *Jamie Swan*; and *Watson*, he thinks, was also taller than *Swan*, and a good deal grosser: That Mr Innes took this liking for *Swan* for about a year before he left off coming to the shop; and the deponent cannot say at what time in that year he and *Watson* personated *Swan*.”

Much the same thing is said by *James Watson*, Purf. proof, p. 17.

Such a mistake as this cannot be attributed to any common want of attention, and evidently shows, that the old man could

could be most grossly imposed on with the greatest ease in matters of the easiest comprehension. But, as further evidence how easily the old man might have been imposed on, and how incapable he was of transacting the most easy pieces of business, your Lordships have the deposition of Mr William Macghie, who had possessed one of his houses for many years previous to his death: After mentioning, that Mr Innes called for one half-year's rent, he depones, Purs. proof, p. 7. G, " That Mr Innes proposed to
 " the deponent to go into Jenny Gairdner's, and drink a glass of
 " white wine, while the foresaid rent was paid; or the deponent
 " rather thinks, upon Mr Innes's proposing to drink a glass of
 " white wine, the deponent mentioned Jenny Gairdner's: That
 " they accordingly went, and drunk a mutchkin of white wine together, and the deponent paid him the half-year's rent in bank-notes,
 " and got Mr Innes's discharge therefor, which the deponent thinks
 " was holograph of Mr Innes himself, and was ready wrote out
 " by Mr Innes, and in his pocket: That after the deponent had
 " given Mr Innes the money, and got the discharge, and after Mr
 " Innes had *counted it over and over again, he at last offered it to the*
 " *deponent, saying, It was none of his money:* That the deponent said
 " to him, Mr Innes, that is your rent, and I have got your discharge for it; so I desire you would put it up carefully in your
 " pocket-book: That Mr Innes recollecting himself, said, He believed it was so, and then put it up in his pocket-book; and the
 " deponent observed to him, That he was old, and appeared not so
 " exact as what he formerly used to be; and therefore desired, that
 " he would mark it in his pocket-book, and put the pocket-book
 " in his waistcoat-pocket: That Mr Innes, upon this, again took
 " out his pocket-book, and *counted over the notes*, and put it into
 " his waistcoat-pocket; and the deponent observed to him, That
 " he did not now seem so accurate as formerly, it would be proper
 " in him to appoint some body to collect his rents, *lest he should be*
 " *imposed upon*, and prayed him for God's sake to put up his money
 " carefully; and Mr Innes seemed thankful to the deponent for
 " this advice: That this, as the deponent thinks, was in the forenoon of the day; and the deponent remembers, that after they
 " left Jenny Gairdner's, he met with some of Mr Innes's friends,
 " and, as he thinks, the claimant Mr Innes of Cathlaw, to whom
 " the deponent said, That Mr Alexander Innes appeared to him to
 " *be sore failed*; and that some other body should collect his rents,

"for that he was in danger of being imposed upon." This evidence, of itself, is sufficient to show the incapacity of Mr Innes, as it is impossible to reconcile such behaviour to his possessing any degree of judgement or memory. The defenders have endeavoured to take off the force of this evidence, by alledging, that Mr Innes's conduct on this occasion was owing to the white wine he drank. But, besides that the quantity was so small, allowing him to have drank an equal share, that it could not have affected any person; yet if it had been owing to this, it could not possibly have escaped the notice of the witness, who, your Lordships see, was at the time strongly impressed with the notion, that Mr Innes had lost his faculties, and went the length to tell his son the same thing.

The petitioner apprehends, that the instances which he hath already stated to your Lordships, from the proof, previous and subsequent to this deed, are none of them consistent with the supposition, that Mr Innes possessed the use of his faculties, and that they must go far to convince your Lordships of his incapacity. But the petitioner will now proceed, *2do*, to state to your Lordships what he apprehends to be still stronger evidence; from which it will appear, that he was at different times unable to distinguish the children of his own family from one another; and that the very defenders themselves, who lived in the house with him, were sensible of his incapacity, and have been heard to own it on many different occasions. Margaret Keppy, Purs. proof, p. 25. K, depones, "That she was nursing a child to Mr Innes of Cathlaw, the present claimant, and left his service at Martinmas 1764: That in the hay-time immediately preceding this term, David and James Innes, defenders, children of the deceased Mr Alexander Innes, were at their brother's house of Cathlaw: That one day, in a conversation which the deponent had with them, David said, *"That his pappa was so doted, that when they were in the room with him, he would not know them till they were named, and afterwards he would forget them again."* And she adds, without any interrogatory put, p. 26. F, "That she once, in another conversation with David, observed, that his pappa and mamma would be sorry on parting with George, who was going to London: to which David answered, That no doubt his mamma would be sorry; *but as for his pappa, he was so doted, that he would never miss him out of the family."* This evidence is explicit and direct, and is a clear proof of Mr Innes's faculties being totally failed, when he not only

ly did not know his own children from one another, but likewise upon being told would immediately forget. — Your Lordships have likewise several instances in the proof of his not knowing his own children. Thus Thomas Waddel, late servant to Mr Innes, Purs. proof, p. 30. K; who, after deponing, That he came to town from the house of Cathlaw, along with a son of the petitioner's, and a son of the deceased Mr Innes's, adds, " That when they came to Edinburgh, to the house of Mr Alexander Innes, a servant-maid opened the door, and Mr Alexander Innes was then in the lobby: That when the two young gentlemen answered, Mr Innes asked, *Who they were? and being told, that it was his son and his grandson, by the servant-maid*, Mr Innes asked, *Which of them was his son?* and the servant-maid having told him, the deponent thinks this was all that passed: That this happened between four and five in the afternoon, as the deponent thinks; and the lobby in which Mr Innes was, was the lobby next to the outer door."

In like manner, Andrew Ramfay, Purs. proof, p. 30. D, depones, " That he was servant to Mr Andrew Alison wine-merchant in Edinburgh, for some years preceding January 1764: That Mr Alison is married to a grand-daughter of the now deceased Mr Alexander Innes's; on which account the deponent has had frequent occasions of seeing the deceased Mr Innes in his master's house, and also of going messages to him: That he has had occasion to see Mr Innes come to the deponent's master's house, when Mrs Stenhouse, Mr Innes's daughter, was there; and upon Mr Innes's first entering into the room, the deponent has observed, that Mr Innes *did not distinguish his daughter from his grand-daughter*: That the deponent cannot condescend upon any particular time when this happened; but he rather thinks it was towards the latter part of the time while he was servant to Mr Alison as above mentioned." And that Mr Innes had been in this situation, and that the defenders had the same opinion of him for a considerable time before his death, appears from the evidence of Miss Henrietta Inglis, Purs. proof, p. 27. K; who depones, " That she remembers that Gilbert Innes, one of the defenders, was at his brother's at Cathlaw in the 1764: That the deponent and Gilbert one day came together from Linlithgow to Cathlaw, and in their way went into the house of Alexander White, tenant to the claimant: That White being told, that Gilbert was a son of
" old

“ old Mr Innes’s, he inquired after the old gentleman’s health :
 “ That Gilbert answered, *He was very frail*; and that if White
 “ and Gilbert were going into Mr Innes’s room, *he would not dis-*
 “ *tinguish the one from the other*; at which White seemed surpris’d:
 “ That she has also heard it said a long time ago, but by whom
 “ she cannot recollect, that old Mr Innes was *deaf*, and *could not*
 “ *distinguish one of his own children from another*; and that she thinks
 “ she heard this from some of Mr Innes’s *children of the second*
 “ *marriage*. Depones, That in the conversation with Alexander
 “ White, White asked, How long Mr Innes had been in that state?
 “ and Gilbert answered, *That he turned so a long time ago.*” And her
 evidence is confirmed by Alexander White, Purs. proof, p. 28. D. Nor
 was this opinion of the failure in Mr Innes’s faculties confined to
 the children: the same were the sentiments of Mrs Innes herself
 in November 1763; as appears from the above-mentioned deposi-
 tion of Janet Murray, p. 23. H; who, after mentioning Mr Innes’s
 not being able to count the change of a guinea, adds, “ And on
 “ this occasion, Mrs Innes *seemed very much concerned, that her hus-*
 “ *band could not comprehend a thing that was obvious to every body*;
 “ *and wrung her hands, saying, she was sorry to see her husband in*
 “ *that way.*”

Such being the situation of Mr Innes, and the opinion of his
 family, it does likewise appear, that they were not afraid to take
 advantage of that state of incapacity which they were so well con-
 vinced of, and to impose on him in the most gross and extraordi-
 nary manner. Of this your Lordships have a striking instance in
 the deposition of James Binning; when a person whom he had
 been acquainted with from his infancy is made to pass upon him
 for a Lord, and he sits with him a whole night under that belief.
 He depones, Purs. proof, p. 19. F, “ That he was acquainted with
 “ the deceased Mr Alexander Innes, and has known him *from the*
 “ *deponent’s infancy*, at least since the deponent was about ten years
 “ of age; and the deponent was in use, when he came to Edin-
 “ burgh, to call at the house of Mr Innes, and ask how he did:
 “ That in spring or autumn 1763, but which of them the depo-
 “ nent cannot positively say, he was in town, and meeting with
 “ two sons of Mr Innes’s, whose names he cannot now recollect,
 “ and also meeting with Joseph Innes, son to the present Mr Innes
 “ of Cathlaw, the claimant, after taking a walk with these three
 “ young

“ young gentlemen, they went to the house of Mr Alexander In-
 “ nes, it being near about tea-time : That the deponent sat down
 “ on a chair, on the other side of the fire, opposite to Mr Innes;
 “ and Mr Innes having asked, who this is ? at least some of the
 “ company, one of his sons said, *This is my Lord Binning*; upon
 “ which Mr Innes answered, his Lordship was very welcome to
 “ him; which occasioned a laugh : That the deponent staid du-
 “ ring the time of tea, and Mr Innes did not seem to know the
 “ deponent all the time; and the deponent also staid till after sup-
 “ per, and was all that time in Mr Innes’s company; but during
 “ the whole Mr Innes spoke little or none, excepting at tea; when
 “ Mrs Innes, not inclining to give so much tea as he chused, he
 “ would have more, alledging, that he had not got so many dishes
 “ as what Mrs Innes alledged he had got; and the deponent thinks
 “ he insisted, that he had got only one dish; and Mr Innes appear-
 “ ed petted and angry at his wife, that she would not give him
 “ all his will. And depones, That Mr Innes *appeared at this time*
 “ *to the deponent to be much impaired in his memory and judgement*;
 “ and he had the same appearance to the deponent *for some years*
 “ *prior to this period*; for Mr Innes, when the deponent had met
 “ him, used to be very kind with the deponent; but for some
 “ years before his death, when the deponent had met Mr In-
 “ nes, he would not have known the deponent; and the depo-
 “ nent would have been obliged *to tell and to explain to Mr Innes*
 “ *who he was*. And depones, That some time before the period
 “ particularly above mentioned, the deponent, and one Robert
 “ Sclate, were coming from the meadow, they met with the de-
 “ ceased Mr Innes upon the walk : That the deponent went up to
 “ Mr Innes to speak to him; but Mr Innes did not know the de-
 “ ponent till he told him who he was.”

From the evidences of these witnesses, it appears what sentiments
 the defenders themselves, both his wife and children, entertained
 of Mr Innes’s capacity, and how little afraid they were of his dis-
 covering the grossest imposition.

Upon the whole of this proof, the petitioner submits to your
 Lordships, that there is evidence of such a train of absurdities in
 Mr Innes’s conduct in ordinary and simple affairs, all clearly pro-
 ceeding from his memory and judgement being totally failed, as
 are not consistent with supposing he possessed the proper use of ei-
 ther. His memory must have been totally gone, when he forgot

that there was an optional clause in bank-notes ; when he forgot again and again the names of his tenants, and persons with whom he was in daily correspondence. And that his judgement likewise must have been totally failed, which is indeed the consequence of such a failure of memory, must be evident from many of the above-mentioned instances of his want of apprehension in the common situations : such as his not being able to count a guinea in silver ; the difficulty with which he could comprehend a receipt for rent ; not to much as knowing his own houses, and being obliged to ask who lived in them ; nay, not even being able to distinguish his children from one another ; together with the instances that have been mentioned ; the grossed imposition being put upon him, without his being able to discover it, both by indifferent persons, and by the defenders his children, who knew and acknowledged the incapacity and dotage of their father.

These instances of a failure of his faculties begin at a time some months prior to this deed, and continued down to his death. It is true indeed, that the petitioner has not brought a proof of his imbecility on the very hour or day when the deed was executed : but this, from the nature of the thing, was impossible ; for it has been already observed, that this deed was executed in a clandestine manner. The only person who could be examined on his situation at that very time, was Mr Charles Livingston, the writer of it, whose evidence shall be afterwards taken notice of. In the mean time the petitioner shall only say, that what he shall aver concerning Mr Innes's capacity at the time the deed was executed, cannot be considered as evidence *omni exceptione major*. Your Lordships must see under what obligation Mr Livingston was to aver boldly, that Mr Innes was in his perfect senses ; as otherwise the having been instrumental to elicit such a deed as this from the man whom he acknowledged had no proper use of his faculties, would not have done himself, nor his character, much honour. But the petitioner apprehends, that he is under no obligation to prove Mr Innes's imbecility on the very day on which this deed was executed ; on the contrary, if the conduct of Mr Innes in simple and easier matters, for a tract of time prior and subsequent to the deed, prove that his memory and judgement were greatly decayed, your Lordships will not easily suppose, that he had so suddenly recovered the use of them for this day, and as suddenly lost the use of them so soon thereafter. If such a proposition could be maintained,

tained, it would be incumbent on the defenders to prove it; and to prove a thing so incredible, the most unsuspected evidence would be necessary.

The petitioner shall therefore now proceed to make some observations on the proof brought by the defenders of Mr Innes's capacity. And in general it must occur to your Lordships, if the fact really had been, that Mr Innes was capable at the time of executing this deed, or during the space to which the pursuer's proof applies, nothing could have been more easy for the defenders, than to have put it beyond all manner of doubt, both by written and parole evidence. The pursuer living, during the whole of this time, at a distance in the country, could not but meet with great difficulties in proving instances of his father's imbecility; and indeed the getting knowledge of any must have been greatly owing to accident. It cannot be doubted, but many more, and perhaps still stronger, instances have occurred, which these defenders are conscious of, though the pursuer has not got notice of them: but if he had been really capable, the defenders living in the same house with him, having a full opportunity of observing every action of his life, must have been able to have pointed out numerous instances, during this space of time, where he had exerted his faculties; yet on examining this proof, your Lordships will find, that no such thing was attempted.

As to the written evidence, it is most trifling and insignificant: it consists of, 1st, A few loose discharges for rent; 2^{do}, An inaccurate blotted cash-book of Mr Innes's.

As to the discharges, they are far from being accurate or distinct, as will appear from inspection; but at any rate, they can have no weight. The writing such a discharge requires almost no judgement; and Mr Innes, who had been in the practice of doing it all his life, would in a great measure do it mechanically, without much, if any assistance, from his judgement. But further, evidence has already been stated to your Lordships, of the manner in which these discharges were made out by Mr Innes, in the deposition of the above William Simson, where your Lordships find, that although he did indeed write out the discharge with his own hand, yet it was with great difficulty Mr Simson could make him comprehend the meaning of it; and he was obliged to read it over six or seven times. This is evidence, that the writing the discharges was merely mechanical, which Mr Innes, from long practice, could

could do, without comprehending it very thoroughly. They are therefore no evidence of Mr Innes's capacity; but the manner in which he granted them, are strong evidence of the contrary.

For the same reason, as little weight can be laid upon the cash-book, which consists only of two pages: and upon examining it, the petitioner apprehends, it rather makes against the defenders; for in this book, besides many errors and inaccuracies, and its being blotted, and almost totally illegible in many places, one very gross blunder appears, which is the marking the payments and receivings on the same column: and as it is not pretended, that Mr Innes kept any other book, it is clear, that notwithstanding the defenders think it so certain a mark of his capacity and distinctness, yet he could never discover from it how his affairs stood. Mr Innes, in the former part of his life, had carried on a great trade, and must have been well acquainted with the writing and keeping of books, as he had an office in the bank: so that this gross blunder in his book, is in reality a proof that he did not retain his former faculties.

This is the whole of the written evidence brought by the defenders. As to the parole-evidence, it is to be observed upon the whole of it, in general, *1mo*, That it consists of the testimony either of persons so connected or dependent on the defenders, that they must have had a natural bias in their favour, which, when they were swearing to a matter of opinion or judgement, without coming to particular facts, would naturally lead them to favour the defenders; or of persons, who seeing Mr Innes overly, and only for a short time, without any particular business with him, had no occasion to observe his incapacity.

2do, Of this evidence it may be observed, that the defenders have rested entirely upon general and vague opinions; and have not, like the pursuer, gone into particulars, and proved instances wherein Mr Innes's capacity appeared; though, as has been observed, if there were any such, they certainly could have done it with the greatest ease.

The first witnesses adduced by the defenders are their two maid-servants. And in the entry the petitioner must observe, that the defenders do very strongly discover the weakness of their cause, when they are obliged to resort to the general opinion of maid-servants to prove Mr Innes's capacity. It would have been more proper to have called persons of character, and of the same rank with Mr Innes, visiting and keeping company with him daily, to have

have sworn to the general opinion of his capacity. Facts may be proven by any, even the lowest ; but a general opinion can only be formed by those who are more particularly intimate with the person. Maid-servants cannot be presumed to have had such intercourse with Mr Innes : And unless they can mention particular facts from which they formed their judgement of his capacity, no stress can be laid on their evidence.

But these witnesses have mentioned no fact to support their opinion, as will appear to your Lordships upon examining their evidence. The first is Primrose Stewart, Defender's proof, p. 1. This witness indeed has averred in very strong terms, That she never observed the *least* sign of want of capacity or judgement in Mr Innes to the *last hour of his life*. It is not believed your Lordships will pay the more regard to her testimony, that she has been so very positive, as the defenders will scarcely maintain, that there must not have been pretty obvious signs of want of both some time before the *last hour* of Mr Innes's life ; which, if this witness had been as much about him as she pretends, she must have observed.

But further, this witness has not been able to support this negative evidence, of not having observed the want of judgement, by any single instance where she observed his judgement and capacity. She has said, That Mr Innes was a careful frugal man about the affairs of his family, yet she has mentioned no instance where he discovered this care and attention. All the facts she mentions are either such as required no judgement or capacity ; Mr Innes's rising at eight in the morning, being displeased that his breakfast was not ready, singing psalms with his family on a Sunday, and such like ; or where-ever she gives instances of actions of Mr Innes, where judgement or memory were concerned, they are directly contrary to her testimony, and prove that she must have observed instances of want of judgement and capacity in him. Thus, she depones, Def. pr. p. 3. C, " That she remembers some time in the winter preceding the death of Mr Innes her master, and, as she thinks, " some short time before his death, but will not say how long, " one evening after Mr Innes had been sleeping in his chair, he " got up, and went towards the door, as if he had been going out ; " and being asked what he was wanting ? he said, he wanted to " be out, to go up stairs to his own house : And being told he " was in his own house, he asked them, if they were sure of that ? " but immediately recollecting himself, he seemed satisfied ; and

“ said that he was wavering, and it was the infirmities of old age.” This the defenders have endeavoured to account for, from his awaking out of sleep ; but it is certainly more natural to attribute it to that cause which Mr Innes, from his own feelings, expressed on the occasion, that he was wavering, and that it was the infirmities of old age. She further depones, p. 3. E, “ That she does “ not remember ever to have seen Mr Innes mistake one of his “ children for another, when he saw them ; but she has observed, “ that when any of them had come in, he would have asked “ which of them it was.” Now, she could not attribute this to his want of sight, which the defenders would take hold on to explain it away ; for she has expressly deponed, in the former part of her oath, That she never saw Mr Innes use spectacles ; and in the latter part, That she never heard him say that his eye-sight was bad ; and the deponent thought he saw very well. So that this witness could not very consistently alledge that she never had observed *any* want of capacity in Mr Innes. Indeed this witness does every where shew a very strong inclination to support her mistress’s cause. Thus, to take away, as it would seem, any bad effects that the palsy might have had upon Mr Innes’s judgement and capacity, she expressly depones, p. 1. C, “ That Mr Innes was seized “ with a severe fit of the palsy, in which he was bad two days or so ; “ but he recovered of this, and went abroad as usual.” The surgeons, however, who attended Mr Innes on that occasion, have expressly deponed, that he was bad much longer. Thus Mr Hamilton, Defender’s proof, p. 6. D, depones, “ That the deponent “ remembers, that in November 1763 Mr Innes was seized “ with a fit of the palsy, which was very severe at first ; and “ the deponent was on this occasion called to visit Mr Innes ; and “ which the deponent did at times, as he thinks, for about the “ space of three weeks, till Mr Innes recovered.” As this was a fact which must have fallen under this witness’s observation, it certainly must go far to take away the credit of her evidence. The defenders, sensible of this, have endeavoured to explain it away, by saying, that she does not alledge that he was not confined to the house longer than two days. But this will not do : for besides that it does appear from the manner of the expression, that the meaning she wanted to convey was, that he had gone abroad after the two days, yet there is another indisputable falsehood in this

(3)

this declaration, her alledging that he was bad two days or so, which never can be explained to signify three weeks.

The other servant, Betty Tait, Def. pr. p. 4. depones in the same manner with the former witness; but, no more than her, can mention any particular instance of any actions where capacity and judgement were necessary, where Mr Innes exerted them. The whole facts she mentions are a set of ridiculous silly trifles, wherein, if Mr Innes had been the greatest child, he could not have gone wrong.

On both these evidences the pursuer must observe, that without alledging against them wilful perjury, there does appear, upon the whole, such an evident inclination to favour their mistress, as ought to set aside the credit of their evidence. Nor can any weight be laid upon their general observation, of not having seen instances of Mr Innes's imbecility, while, with the same breath, they give examples to the contrary.

Andrew Forrest likewise, keeper of a coffeehouse, Def. proof, p. 8. and Helen Black his spouse, p. 9. have been brought by the defenders as evidences; and they depone in the same general vague manner, that they never did observe any thing about Mr Innes, as want of capacity or judgement; and as they likewise say, that they never had any transactions with Mr Innes in the way of business or money-matters, little regard can be had to their evidences.

It is not pretended, nor is it necessary for the petitioner to say, that Mr Innes was reduced to such a state of absolute idiocy, that he could not walk into a coffeehouse, or talk a few general words to the waiters, without its being immediately discovered that he had lost his memory and judgement.

Your Lordships will compare these evidences of maid-servants and keepers of coffeehouses, with those adduced by the petitioner, persons who had real business and affairs with Mr Innes, who had not the same difficulty of observing the evident failure of his faculties.

The defenders likewise have founded upon the evidence of the two gentlemen who attended as surgeons to Mr Innes when affected with the palsy above mentioned, Mr Hamilton and Mr Inglis. As to the evidence of the first of these gentlemen, Def. proof, p. 6. it amounts to no more than this, That seeing Mr Innes now and then by the by, he did not observe any want of judgement or capacity about him. Although he says that Mr Innes made sufficiently

ciently pertinent answers to the questions he put; yet he does not tell your Lordships what questions those were; so that no judgement can be formed from this of Mr Innes's capacity: and he further adds, that he made these questions as few as possible, as he saw it was troublesome to Mr Innes to discourse. He depones to the fit of the palsy's being so severe and universal, that he expected it would have ended in death. But as to the situation of Mr Innes's mind, he refers to Mr Inglis, the next witness, who attended him during that disorder, Def. pr. p. 7. And the petitioner apprehends, there is not a single word in that evidence, from which it can be inferred that Mr Innes retained the use of his faculties entire. It is true, that upon mentioning his unexpected recovery, he adds, that his senses recovered along with his body; which was nothing more than saying, he had recovered from the state of total insensibility in which he was thrown by the palsy. But as to his faculties he depones, p. 8. B, " That with respect to Mr Innes's judgement or capacity, he did not observe any signs about him of any want of these, *except such as was connected with his disease*, in the time when he was affected with the paralytic disorder above mentioned, *and such as do naturally arise to every person from advance of years, and decline of life*; for no doubt the mind turns weaker with the body." So that he is here evidently saying, that he had perceived this failure in Mr Innes's faculties, tho' indeed he words it very cautiously. And with respect to both these gentlemen, the petitioner could not expect, whatever was the state of Mr Innes's mind, that persons who had so little intercourse with him, were to aver positively that he had lost his judgement or his reason. And for the same reason, the evidences of several other witnesses are of as little consequence, who had only seen Mr Innes overly, and had no further intercourse with him, except asking how he did, or some such trifling question. Thus David Skeel mealmaker, Def. proof, p. 10. who is brought to depone, that in passing and repassing he did not observe any want of capacity in Mr Innes. In like manner Anne Lewis, who happened to sell twopenny to Mr Innes's family, is likewise brought to depone, that she did not observe his want of memory or judgement, Def. proof, p. 11. And the same applies to the next witness founded on by the defenders, William Stewart writer in Edinburgh, Def. proof, p. 11.

All that appears from this witness's deposition is, that in paying his rent to Mr Innes, he had not observed any want of capacity or judgement in him, and that he had taken notice of a Glasgow note. But your Lordships will likewise observe, upon examining this deposition, that Mr Stewart confesses, that he had little occasion to know or be acquainted with Mr Innes, further than as to the particulars above mentioned; and that Mr Innes did not write the discharge in Mr Stewart's presence, but brought it along with him ready wrote out: so that Mr Stewart could have little opportunity of judging, from so simple a transaction as Mr Innes delivering the receipt, and Mr Stewart the money, what was the state of Mr Innes's mind: When therefore he afterwards says, Mr Innes appeared to be distinct, this can only refer to this transaction, and no weight can be laid upon it.

One circumstance your Lordships will observe in the deposition of this witness, which corroborates the failure of Mr Innes's memory; for although Mr Stewart had been his tenant for a considerable time, yet when he came with his rent, Mr Innes seems to have forgot both his name and surname, and was obliged to ask them at the witness.

Some use is likewise attempted to be made of a circumstance mentioned by Mr Charles Livingston writer of the deed, in order to show Mr Innes's capacity, which your Lordships shall have in his own words, Purs. proof, p. 5. G, " Depones, That in the month " of October or November, after executing the above deed, the de- " ponent was ordered by old Mr Innes, or by *Charles Innes his son*, " the deponent will not positively say which of the two, to make " out a factory for Charles for uplifting the rents of the houses in " the town of Edinburgh, and which factory the deponent ac- " cordingly made out, and was one of the witnesses to the signing " thereof, and Alexander Mercer merchant in Edinburgh, son of " William Mercer, one of the claimants, was the other witness: " That when this factory was signed, it was read over to Mr In- " nes; and as it contained a clause that Charles was not to be lia- " ble for omissions, the old gentleman took notice of this clause, " and objected to it; but the deponent remonstrated against put- " ting out this clause, and told old Mr Innes, that it was a com- " mon and ordinary clause in such deeds." When Mr Mercer, who is mentioned by Mr Livingston as the other subscribing wit- ness, was called upon to declare what he knew of this matter, the

account which he gives of it is as follows. After telling that Charles Innes, one of the defenders, desired him to be witness to the above factory, he depones, Purf. proof. p. 32. K, " That the deponent remembers the factory was read over to Mr Innes, and parts of it, at the old gentleman's desire, *read over and over again*, before the old gentleman signed it, and to which the deponent signed as witness. And the said factory being exhibited to the deponent, and he having perused the same, he thinks the clause was frequently read over, whereby *power was granted to the said Charles Innes, to give unto Isabel Inglis my wife, whatever sums of money she from time to time shall demand for her own use, and for the use and maintenance of me and my family, without any order from me to that effect; and also this clause, And it is hereby declared, that the said Charles Innes shall not be liable for omissions, but only for his actual intrusions*: That it appeared to the deponent, that his grandfather *did not properly understand the import of these clauses at first reading*; and therefore he desired them to be read over and over again before signing: That the deponent's grandfather, after he had wrote the first letter of his name, stopped short, and seemed not to understand some parts of the factory, and wanted that they should be *read over again*, which was accordingly done before he finished his subscription; and it was the deponent's opinion, owing to his grandfather's desiring the factory, or parts of it, to be often read over, *that he understood nothing further about it, but only that it was a factory*; and that the subscription was very badly executed, and not so well as what the deponent imagined his grandfather was in use to write."

Your Lordships see in what a different light this matter appears in the account given of it by Mr Mercer, from Mr Livingston's manner of telling the story. From what the latter gentleman says, your Lordships might suppose that Mr Innes's making the deed to be read over, and hesitating so much, was owing to his peculiar acuteness and accuracy; but it appeared in a very different light to Mr Mercer, who formed this conclusion from the whole, that Mr Innes after all did not understand the nature of the deed which he was executing, further than in general, that it was a factory. As there is no reason why your Lordships should prefer Mr Livingston's account of this matter to Mr Mercer's, this story of the factory can be no evidence of Mr Innes's capacity.

The

The petitioner, therefore, apprehends, that the defenders have failed in this proof of capacity, as they have been obliged to rest upon vague and general opinion, and have not been able to point out special and particular instances as the petitioner has done. The petitioner further submits to your Lordships, that this vagueness and generality in the defenders proof, does corroborate the evidence which he has brought of the imbecility and failure of his father's faculties. For as from the pursuer's proof there appears many instances of this imbecility which have come to the petitioner's knowledge, so the defenders proof is the strongest evidence, that during the space of time to which the proof refers, Mr Innes had exerted no degree of capacity or judgement ; for otherwise such was the situation of these defenders, that most certainly they must have known, and could have pointed out instances of it much more unquestionable than any thing they have attempted.

On the whole, it seems to be sufficiently established from the proof, that Mr Innes was in such a situation as not to be capable of executing, from his own deliberate purpose and intention, a deed of this kind, disinheriting his son, and directly contrary to the obligation of his marriage-contract. At the same time, the petitioner apprehends, that a proof of total incapacity is not incumbent on him ; and that if your Lordships should be of opinion, that the mental faculties of Mr Innes were so much decayed, and reduced to such a state of imbecility, that the defenders could easily impose upon him, this, together with the suspicious manner in which the deed was executed, and the proof of undue means and solicitations used, will be sufficient to convince your Lordships, that this deed was not the free act of Mr Innes, but imposed upon him by these defenders.

This leads the petitioner, *3tio*, to make some observations on the undue means used in obtaining and executing this deed.

And *ex facie* of the deed itself, and from the nature of it, there is the strongest presumption that this deed was not the free act of Mr Innes, but elicited from him by undue means. The petitioner has already stated to your Lordships the proof from which it appears that this deed was directly contrary to the declared resolutions of Mr Innes but a few months before ; and he will here mention another particular, which must strike your Lordships strongly, as an instance of the rapacity of these defenders, and how improbable it is that this deed was the free act of Mr Innes.

Mr

Mr Innes's daughter Grizel, who was married to Mr Littlejohn, died, leaving three orphans behind her in very narrow circumstances; as no tocher had ever been given with their mother, Mr Innes, by his settlement made in the year 1753, appointed L. 2000 Scots to go to his grandchildren. This trifling sum, however, it would seem Mrs Innes thought too much for children of the first marriage, and therefore in this new settlement they are entirely left out. The petitioner may say, at least, that it is not probable that Mr Innes, if his faculties had not been greatly failed, and indeed if he had not been grossly imposed on, would have ever committed such a piece of cruelty to three orphans, his own grandchildren.

That undue sollicitations were actually used by the wife, appears clearly from the above-mentioned deposition of Margaret Gray, a servant in the family, preceding Whitsunday 1763, Purf. proof, p. 31. E, " She depones, That one day when she was in the foresaid service, coming out of the kitchen, Mr Innes and his wife being then in the fore-room, and the door open, she heard Mr Innes saying to his wife, *I will not wrong the children of my first marriage, for I got nothing with you; and he seemed to say this with an angry tone.*" From this evidence it appears clear, that the wife had been at this time tampering with her husband, though then it proved ineffectual; but other ways and means seem to have been fallen upon to prevail with the old man to disinherit his son. Mr Charles Livingston, likewise nephew to Mrs Innes, who had afterwards so much concern in this affair, interfered to spirit up these defenders to get Mr Innes to make a settlement. Your Lordships shall have his own account of the matter. He depones, Purf. proof, p. 1. " That he is nephew to Mrs Innes, one of the parties in this cause; the deponent's mother and Mrs Innes were sisters: That the deponent's father had the keeping of Mrs Innes's copy of the contract between her and her husband: That the deponent remembers to have heard his mother say, when talking about the provisions made to Mrs Innes in her contract of marriage, and to her children, or rather the provisions to her children, That in case Mr Alexander Innes the husband died without making some farther settlement to them, these children would be very ill provided: That some time after the deponent's mother's death, which he thinks was in the 1762 or 1763, he remembered what his mother had said upon the above subject, and did thereupon,

" look

“ look into the contract of marriage between Mr Innes and the
 “ deponent's aunt ; and one day thereafter, meeting with Charles
 “ Innes, the eldest son of the second marriage, at the cross,
 “ the deponent spoke to him upon this subject, and told Mr
 “ Charles Innes, that as the children of the second marriage
 “ seemed to the deponent to have small provisions made to them
 “ for such a numerous family, *that he, the deponent*, thought
 “ that Mr Charles should move his father to settle his affairs :
 “ That Mr Charles answered, That he knew his father's tem-
 “ per was such, that he did not like to see a disposition in
 “ any person to be greedy ; and that therefore he did not chuse to
 “ speak with his father upon this subject : That the deponent upon
 “ this mentioned to Mr Charles Innes, that he should speak to Mr
 “ George Innes, cashier in the Royal Bank, who was nephew to the
 “ old gentleman, to see if George Innes knew whether old Mr Innes
 “ had made a settlement, or not ; and if none such was made, that
 “ Mr George Innes should speak to his uncle to make one. And the
 “ deponent remembers, that some short time thereafter Mr Charles
 “ Innes told the deponent, that he had never spoke to George In-
 “ nes upon the subject ; and he has told the deponent so since the
 “ commencement of the process now under submission.”

It is to be observed, that this conversation must have happen-
 ed some time in summer 1763, as it appears from a note produ-
 ced in process, that Mr Livingston's mother did not die till the
 month of April that year. However, Mr Charles and his mother
 seem to have made very good use of the hint given them by Mr
 Livingston, and with his assistance the deed was soon after exe-
 cuted.

As to the manner in which it was executed, the only evidence
 which could be examined, was the same Mr Livingston, writer of
 the deed, and nephew to the defender Isabel Inglis. The petition-
 er shall here insert his account of the matter, Purs. proof, p. 2. I,
 “ And being interrogate as to the executing of the deed dated the
 “ 21st day of February 1764, depones, That some days before
 “ this deed was executed, *Mrs Innes, the deponent's aunt, called up-*
 “ *on him, and told the deponent, that her husband was wanting to*
 “ *make a settlement of his affairs, and that he wanted to see and speak*
 “ *with the deponent for that purpose*: That the deponent said, that
 “ he was very glad to hear that, for that her and her children
 “ could hardly be worse provided than what they were by the mar-
 M riage-

" large contract; or rather, that Mr Innes might make them bet-
 " ter, but he could not make them worse than what they were
 " provided to by the contract of marriage: That the deponent on
 " this occasion asked Mrs Innes, If she knew in what way her
 " husband proposed to settle his affairs? That she answered, She
 " did not know; but the deponent must come and speak with Mr
 " Innes the afternoon of that day upon the matter: That the de-
 " ponent accordingly went to Mr Innes, and had a conversation
 " with him upon the subject of his settlement: That Mr Innes told
 " the deponent, he was an old man, and wanted to settle his af-
 " fairs; and gave the deponent orders to make out a deed of settle-
 " ment; and for that purpose gave the deponent a note holograph
 " of Mr Innes himself, containing the provisions, or way and
 " manner how he intended to settle his affairs; *which note the de-*
 " *ponent, at Mr Innes's desire, returned to him after the deed was ex-*
 " *ecuted;* and which note the deponent, in a search that he lately
 " made by order of the arbiters through Mr Innes's papers, had
 " it in view to have shown to the parties, if he could have found it,
 " as he thought it would have given them satisfaction; *but this note*
 " *was not among, or at least the deponent could not find it among, Mr In-*
 " *nes's papers.* Depones, That he made out a scroll of the settle-
 " ment directly in terms of this note; and no other body gave
 " him instructions about making out the settlement, except Mr
 " Innes; only that as this note contained no more but a general
 " direction, to make out a disposition to his houses in Edinburgh,
 " without telling the boundaries, or the persons possessing these
 " houses, the deponent desired his aunt to come to him, and tell him
 " the tenants names, and where the houses lay; and which she
 " accordingly did: That this note, *as the deponent thinks, did not*
 " *make any mention of moveables; and upon the deponent's noticing this*
 " *to Mr Innes, Mr Innes said, he had no moveables: That upon this*
 " *the deponent said, that he would put in a general clause as to move-*
 " *ables; and Mr Innes made no objection; but he does not remember if*
 " *he said any thing.* Depones, That this note also contained a di-
 " rection, that the deed should be burdened with L. 1000 Scots to
 " the present Mr Innes of Cathlaw; and the scroll of the deed was
 " made out in these terms; but when the deponent came with the
 " scroll, and read over the same to old Mr Innes, he told the de-
 " ponent, that he had altered his mind with respect to this L. 1000
 " Scots, and that, in place thereof, he intended to give his son
 " L. 108 Scots a-year during his life; and which alteration the de-
 " ponent

"ponent made upon the scroll in old Mr Innes's presence, and left
 "it with him. Depones, That the deponent read the scroll more
 "than once over to old Mr Innes; and after the alteration was
 "thereupon from the note as above mentioned, as the deponent
 "thought that old Mr Innes *was giving his son too little*, that is the
 "claimant, the deponent put the question to old Mr Innes, *If he*
 "*inclined to give his eldest son of the first marriage no more?* To which
 "the old gentleman answered, That he had got enough; and that
 "the L. 108 Scots then provided to him, was just L. 18 the piece
 "off each of the children of the second marriage: That this scroll
 "old Mr Innes kept till the third day after it was left with him,
 "when he again sent for the deponent, and the scroll was again
 "read over by the deponent; and he was desired by old Mr Innes
 "to take it home and extend it; which the deponent according-
 "ly did in the precise terms of the scroll, and brought it to
 "Mr Innes the next day; when he again read it over to
 "him more than once; and it was subscribed by Mr Innes, before
 "the deponent, and John Edgar, the other witness designed in the
 "deed: That the deponent read this deed to Mr Innes; but Mr
 "Innes did not read it himself when it was signed; but the deed
 "was left with Mr Innes; and the deponent remembers, that Mrs
 "Innes was in the room when the deed was signed; and after the
 "business was over, she brought out a bottle of wine, and they
 "drank a glass together: That Mr Edgar, after taking a glass,
 "went away; and the deponent minds that Mr Innes said to his
 "wife, *My dear, are you satisfied?* To which she answered, She
 "was very well satisfied; and added, *I am sure you have got your*
 "*own will in it;* which he said was very true, or words to that
 "purpose. And being interrogated, If Mr Innes, when he spoke
 "to his wife as above mentioned, if the expression was not, "Are
 "you satisfied now?" depones, That he cannot say positively whe-
 "ther the word *now* was used or not. Depones, That he went from
 "Mr Charles Brown's writing-chamber to the house of old Mr In-
 "nes to get the deed executed: That the deponent had in view,
 "before he left the chamber, that possibly a witness might be
 "wanted to sign the deed; and the deponent spoke with John Edgar,
 "that in case the deponent sent for him to Mr Innes's, that he
 "would come; which Mr Edgar agreed to do: That when the de-
 "ponent had read over the deed to Mr Innes, he asked, If any
 "person could be conveniently got to sign along with the deponent

" as

" as witnesses ? and this not being convenient, the deponent sent
 " one of Mr Innes's servants for Mr Edgar ; who came, and signed
 " witness along with the deponent ; *but the deed was not read over*
 " *in Mr Edgar's presence.* Depones, That Mr Innes did not give
 " the deponent any directions anent getting the boundaries, or the
 " persons names who possessed the houses, from Mrs Innes ; but
 " it occurred to the deponent, that he had no occasion to trouble
 " Mr Innes upon this matter ; but the deponent remembers, that
 " when the deponent read over the scroll, there were mistakes as
 " to the situation of the houses with respect to the closes where they
 " lay, and the tenants names who possessed them and some of
 " the tenants Christian names being left blank ; all which old Mr
 " Innes corrected, and put the deponent right in, when the scroll
 " was read over. And being interrogated, How he Mr Livingston
 " came to mention to Mr Innes, or to put into the scroll, the dis-
 " position to moveables, seeing no such thing was mentioned in
 " the note, and seeing that he, the witness himself, thought that
 " the provision given to Mr Innes, the claimant, was too small ?
 " depones, That after reading over the note, he conversed with
 " Mr Innes upon the subject of his settlement ; and as he under-
 " stood from Mr Innes, that he wanted to make a general settle-
 " ment of all his affairs, and to give all the effects he then had to
 " his children of the second marriage, made the deponent mention
 " moveables, which he saw was not contained in the note. And
 " being interrogated on the part of Mrs Innes, depones, That ex-
 " cepting this single time, when Mrs Innes desired the deponent
 " to come to her husband, and speak to him about making a set-
 " tlement, the deponent had never any other conversation with
 " her upon that subject, or about the provisions made to her in
 " her contract of marriage." And as to Mr Innes's capacity, de-
 " ponos, p. 5. K, " That when Mr Innes executed the deed of settle-
 " ment above mentioned, he was going out, as consists with the
 " deponent's knowledge : for he was out that day it was signed,
 " as the deponent was told ; and the deponent has seen him out
 " several times afterwards upon the streets : That at this time he
 " appeared to the deponent to be sensible, and to understand what
 " he was doing, otherwise the deponent would not have been con-
 " cerned in the writing or executing of any such deed."

It is to be observed, *imo*, That no evidence has been brought by
 the defenders, that ever Mr Innes, previous to this time when Mr

Livingston

Livingston is sent for, gave any intimation, either to him or any other person, of his intending to make such a settlement. *2do*, That when he is sent for to concert this deed, it is not at the desire of Mr Innes the granter, but his wife, in favour of whose children it was to be granted. *3tio*, That at none of the communings, either when Mr Livingston says he got the note from Mrs Innes, or at giving him the scroll of the deed, or at the reading it over, is there ever any other person present, except this lady alone. The other subscribing witness, Mr Edgar, is never introduced till Mr Innes is signing his name, when not a word passes upon the matter. So that your Lordships see the only persons in the knowledge of this deed are Mrs Innes the defender, and Mr Livingston. How, and in what manner, it was concerted or executed, must rest, therefore, entirely on the evidence of Mr Livingston, the writer, and near relation to those in whose favour it was granted.

The defenders took much offence that the petitioner should make any objections to Mr Livingston's conduct in this affair. It is not the petitioner's design to throw out any general reflections against the character of any witness; but the petitioner must think himself at full liberty to state to your Lordships every objection he has to Mr Livingston's conduct in this affair, and every thing that appears inconsistent and contradictory on the face of his evidence. The facts are before your Lordships, in Mr Livingston's deposition; and your Lordships will judge whether the observations on them are well founded.

And, in the entry, the petitioner cannot help lamenting, that Mr Livingston's testimony must stand single; that some person was not chosen to join him as a subscribing witness, to whom the contents of this deed might have been communicated. The petitioner cannot help suspecting, that this was owing to no other reason but the fear which the persons concerned in impetrating this deed were under, of exposing to the eyes of witnesses Mr Innes's situation, and the arts then used with him.

Mr Livingston must impute it to himself, that there is room for this observation. His conduct in this affair, the petitioner is obliged to observe, has not been sufficiently delicate; and he ought certainly to have taken care, that the fairness of his conduct should not rest merely on his own evidence. It is believed, that most men of business, however well established their character may be, if they had gone to an old man of eighty-four, in the frail situation

of Mr Innes, not at his own desire, but that of his wife, and were to concert and execute a deed for him, whereby his eldest son of a former marriage was to be disinherited, and his fortune settled upon her and her children, would have chose at least to have some one other person in the knowledge of, and present at the whole affair, to testify what passed on the occasion, and vindicate their own conduct; especially if this deed was to be kept a secret from those to whose prejudice it was granted, and not to appear till the grantor's death. But Mr Livingston had still a farther motive to be more delicate and cautious, from his near relation to the lady and children in whose favour it was granted, and his consciousness of his having tampered with the children to get their father to execute settlements upon them. In such circumstances, for Mr Livingston, the writer of the deed, to rest entirely on Mr Innes's having signed it, without any evidence but his own to testify either the orders the old man gave about it, or that it was read over to him, it must be owned has a very suspicious appearance.

But, after all, if Mr Livingston was to join in this clandestine manner of executing the deed, surely it was incumbent on him, in vindication of the share he had in it, cautiously to preserve and retain whatever could be an evidence of its being the free act and deed of the grantor: it must therefore appear surprising, that Mr Livingston, who says, he received a note holograph of Mr Innes, containing the manner how he intended to settle his affairs, should not have insisted upon keeping this note, to vindicate what he had done; as, by parting with it, the whole burden of a fair and due execution came to rest upon his own averment.

As this averment therefore is unsupported with any other evidence, the petitioner thinks himself well intitled to say, that if Mr Edgar, or any indifferent person, had been allowed to have been present at the time when this deed was executing, they would probably have given a very different account from Mr Livingston, both of Mr Innes's state of mind at executing the deed, and how far he understood or comprehended the nature of it. This the petitioner thinks he has the best grounds to aver, upon the evidence he has already stated to your Lordships, of a deed executed immediately after this, of which Mr Livingston was likewise the writer and subscribing witness. It appeared then to this gentleman, the same as at the executing of the present deed, that Mr Innes was perfectly acute and sensible, and knew perfectly well the meaning

ing of every sentence of it. But the other subscribing witness having been admitted to see Mr Innes's behaviour at the time the deed was read over, differed very widely from Mr Livingston on these points; and from the whole of Mr Innes's behaviour, concluded, that he understood nothing further about it but that it was a factory. From this it may certainly be deduced, that no stress can be laid on the single testimony of Mr Livingston, and may be fairly presumed, that another witness would have differed from him in the ideas he entertained of Mr Innes's state of mind and comprehension.

The petitioner therefore submits to your Lordships, that if he has been able to bring any evidence, that his father, at this time, was, from the failure of his mental faculties, in a situation to be easily imposed upon, your Lordships will consider this deed, granted under such circumstances, as totally destitute of that evidence of a free and fair execution which would be necessary to support it.

But further, there are several circumstances upon the face of Mr Livingston's deposition, and in the account he has given of this matter, which the petitioner cannot allow to escape unnoticed.

And, *1mo*, With regard to Mr Innes's state of mind, Mr Livingston has not only been very positive in averring, that his judgement and memory were perfectly sound; but likewise has mentioned a very extraordinary instance indeed of Mr Innes's distinctness: for he says, that after he wrote out this scroll of the deed, that old Mr Innes was so accurate as to rectify mistakes, not only in the situation of the houses, but likewise the tenants names, and even their Christian names, where they had been left blank. How far this is consistent with the proof already adduced, of his scarce being able to recollect the names of his tenants, is submitted to your Lordships. But what is most surprising is, that this person, so exceedingly exact as to recollect distinctly the Christian names of his tenants, should have fallen into one of the most capital blunders in point of memory that well can be conceived: For when Mr Livingston asks him, for a purpose that shall be afterwards mentioned, whether he had any moveables? Mr Innes answered, that he had no moveables, although it is an unquestionable fact, that he had a considerable moveable estate; for besides the furniture of the house he was sitting in, the petitioner was due him a bond of L. 400, with interest to the amount of L. 300, besides L. 100 share
of

(32)

of the sugar-house, &c. and some other particulars unnecessary to be mentioned here.

And, *2do*, As to the execution, the petitioner does aver, That according to the account which Mr Livingston himself has given of the execution of this deed, he has by no means adhered to the directions said to be given by the granter; and that from the face of his own deposition there appears a manifest partiality to his aunt. Your Lordships will observe, that Mr Livingston deposes, That he made out a scroll of the settlement, and that the note contained no more than a general direction to make out a disposition to the houses in Edinburgh: He afterwards adds, "That this note, as the deponent thinks, did not make any mention of moveables; and upon the deponent's noticing this to Mr Innes, Mr Innes said he had no moveables: That upon this the deponent said, That he would put in a general clause as to moveables; and Mr Innes made no objection; but he does not remember if he said any thing."

In what manner Mr Livingston's conduct in this affair can possibly be vindicated, the petitioner is at a loss to know. In the first place, if he was here only acting as a man of business, why did he interfere any further, than to execute the directions he says he had received for making out a settlement of his heritage? The bare soliciting the old man to give his moveables likewise to these defenders, Mr Livingston's friends, was not consistent with this character, of merely acting as a man of business in the affair, which Mr Livingston is to desirous to be considered in. But further, if he was to be solicitor for the defenders, at least he ought not to have inserted a clause of this kind, without the most express orders and directions from the granter. Mr Livingston therefore is not at all excusable, for so rashly inserting so important a clause, upon his own suggestion, without any further approbation from the old man, than his not making any answer, which might very readily proceed from his not taking notice of it; and Mr Livingston is still the less excusable, that from what Mr Innes had said, he must evidently have seen, that Mr Innes did not imagine he was possessed of any moveables. This could not be Mr Livingston's opinion; he must have known that he was proprietor of some moveables, at least of the furniture of the house he was sitting in. Under the cloak, therefore, of this general clause, were disposed subjects to these defenders, without any thing that can be called a proper or explicit consent on the part of Mr Innes. For Mr Livingston to take upon himself to do a thing
of

of this kind, in a deed executed in such a clandestine manner, where there were so many circumstances that should have made him so exceeding cautious, and where his partiality to the defenders would naturally be suspected, cannot bear any favourable construction: and although Mr Livingston is at much pains to have it thought, that he was sensible of the injustice Mr Innes was doing his eldest son, by giving him so little; yet that is not at all reconcileable with his conduct in this matter, when your Lordships take into your consideration his readiness to insert the clause above mentioned without any orders.

Indeed, excepting this note, which Mr Livingston has never been able to discover, the whole of this deed, even from Mr Livingston's account of it, appears to be the fabrication of Mrs Innes. She it is that sends for him to come in order to get it executed; and when Mr Livingston finds himself at a loss for the subjects that are to be conveyed in it, it is to her, and not to Mr Innes, that Mr Livingston applies. And what indeed strongly indicates who was in fact the framer of the deed, is the question which Mr Innes puts to his wife, after all is over, "My dear, are you satisfied?"

Considering therefore the clandestine and undue manner in which this deed had been executed, it was not surprising that these defenders should be so anxious to keep it a dead secret, and should have been so much afraid of its coming to light.

That they were greatly afraid of this, and of its being known what share they had in obtaining it, appears clearly from the behaviour of Charles Innes, who, at the time of opening his father's repositories, denied that he knew of any deed having been executed by his father, Purs. proof, p. 34. H; though he has been obliged to acknowledge, upon oath, that Mr Livingston had shewed him the scroll of the deed in question soon after it was executed; and that, even previous thereto, his mother had informed him of it. It is needless to observe to your Lordships, that this defender could not have denied his knowledge of it with any other view, than to make it be believed, that he and his mother had had no hand in it, and that it had proceeded entirely from the old gentleman's free will and deliberate act.

On the whole therefore the petitioner apprehends, that he has stated satisfactory evidence to your Lordships, that his father was reduced to such a state of imbecility at the time this deed was

O

granted,

granted, that it was an easy matter for these defenders to impose upon him. And although it was impossible for the petitioner to bring a positive proof of the imposition at the time this deed was impetrated, on account of the clandestine manner in which it was executed; yet the petitioner apprehends, that the proof must be equally convincing which he has brought, of many circumstances inconsistent with this deed's being the deliberate and free act of Mr Innes, joined with the strong presumptions arising from the conduct of the defenders, and from the nature of the deed itself. The petitioner therefore hopes your Lordships will see good reason to set aside this deed, impetrated from his father by the undue artifices of his second wife, whereby he is disinheriting the petitioner his son, contrary to the obligations of his first marriage-contract, and to every previous deed and settlement when his judgement was entire.

May it therefore please your Lordships, to alter the Lord Ordinary's interlocuter, and to reduce the said deed of the 21st February 1764, upon both or either of the reasons of reduction libelled.

According to justice, &c.

GEORGE OGILVIE.

State

State of the heritable and moveable estate of the deceased
Mr Innes, at the dissolution of his first marriage with
Margaret Heriot.

To amount of bonds, &c. as with certainty appears from his books,	-	L. 2230	0	0
The lands of Cathlaw, as appears by the writs,	-	1027	15	6 $\frac{2}{3}$
The houses in Edinburgh purchased during the subsistence of the first marriage, cost about	-	1800	0	0
Above L. 100 Sterling due by Colonel Johnston of Gratney,	-	100	0	0
A bill of L. 100 Sterling, due by Carr of Cavers to Mr Innes, with ten years interest, which Mr Innes had a process for before the court of session, and prevailed,	-	150	0	0
		<hr/>		
		L. 5307	15	6 $\frac{2}{3}$

And besides all the above, two furnished houses, one in town and another in the country; which, including silver-plate, &c. may well be computed at

300	0	0
<hr/>		
L. 5607	15	6 $\frac{2}{3}$

State of the sums paid, and subjects disposed, by Mr Innes, to his children of the first marriage.

To his eldest son, Alexander Innes, the lands of Cathlaw, which appear by the writs to have cost	-	L. 1027	15	6 $\frac{2}{3}$
To the household-furniture thereon, about	-	150	0	0
To William Innes his second son, to the amount of	-	425	0	0
To Alexander and David Littlejohns, sons to his eldest daughter Grizel Innes, <i>per account</i> ,	-	107	8	11
		<hr/>		
Carried forward,		L. 1710	4	5 $\frac{2}{3}$

	Brought forward,	L.	1710	4	5 $\frac{1}{3}$
To Margaret Innes,	-	-	166	13	4
To Janet Innes,	-	-	166	13	4
To Isâbel Innes,	-	-	166	13	4
To Joan Innes,	-	-	166	13	4
			<hr/>		
		L.	2376	17	9 $\frac{2}{3}$
To Isâbell Innes at several times,	-	-	66	13	4
			<hr/>		
		L.	2443	11	1 $\frac{2}{3}$

What money Joan Innes got over and above the 3000 merks above mentioned, was not given by her father as a provision, but was money in his hands as administrator in law to her, to which she succeeded by her grandfather. Indeed it is not to be supposed that Mr Innes would give her more than any of the rest of the daughters, especially when she married, as the defenders say, without her father's consent.

State of Mr Innes's funds at his death; and what the children of the second marriage will succeed to if the deed continues in force.

The houses in Edinburgh, as valued by Mess. Miln and Brown,	-	-	L.	2708	0	0
Stock in sugar-house,	-	-	-	100	0	0
Stock given to Charles Innes, <i>per</i> his oath,	-	-	-	200	0	0
A furnished house, and silver plate, at least	-	-	-	200	0	0
Two bonds by Alexander Innes now of Cathlaw, granted by him to his father, for	-	-	-	400	0	0
Interest due thereon, about	-	-	-	300	0	0
				<hr/>		
			L.	3908	0	0

A N S W E R S

F O R

Isabel Inglis, Relict of the deceased Alexander Innes of Cathlaw ; and for Charles, George, David, Archibald, Gilbert, and James Innes's, Children of the Marriage betwixt the said Alexander Innes and Isabel Inglis ;

T O T H E

P E T I T I O N of Alexander Innes of Cathlaw.

THE deceased Alexander Innes of Cathlaw, merchant in Edinburgh, was twice married.

By his contract of marriage with Margaret Herriot, his first wife, dated 13th August 1708, Mr Innes became bound “ to provide the sum of 15,000 Merks “ to himself and his future spouse, and longest liver of them two, “ in liferent, and the bairns lawfully to be procreate betwixt “ them, in fee.” The contract likewise contains a clause, providing to himself and the *children* of the marriage, “ whatsoever “ lands, heritages, annualrents, and others he shall happen to “ conquest and acquire during the marriage.”

Of this marriage there was issue, two sons and five daughters, Alexander the petitioner, William, Grizel, Isabel, Janet, Margaret, and Joan.

The marriage dissolved by the death of Mrs Innes in the year 1730.

Mr Innes, in implement of the obligation contained in his contract of marriage, made very ample provisions in favour of the above-named children of the marriage, in the following manner.

On the 31st January 1740, he disposed to Alexander, his eldest son, the estate of Cathlaw, Curchills, &c. burthened only with

Mr Innes's own liferent; which liferent, it was also declared, should expire immediately upon Alexander's marriage: and he having accordingly married within two years after the date of the disposition, Mr Innes yielded up to his son the entire possession of this estate, which has been enjoyed by him ever since.

This estate of Cathlaw had been purchased by Mr Innes in 1725, at the price of L. 1027 Sterling. During the time that it was in his own possession, Mr Innes had expended upwards of L. 1000 more in building a house, and making improvements. At the time, therefore, when it was given up to Alexander, the estate of Cathlaw cannot reasonably be estimated at less than L. 3000 Sterling. Its present value, as appears from the evidence adduced in the course of this process, is considerably more, being about L. 3700.

To William his second son, Mr Innes, in the years 1741, 1743, and 1751, advanced considerable sums to account of his patrimony, as expressed in the receipts, amounting in all to L. 425, 3 s. Sterling.

Grizel, the eldest daughter, married David Littlejohn, without the consent of her father, and died without receiving any share of his effects. But it appears from an account made out by Mr Innes, and found in his repositories, that he paid out for the maintenance, cloathing, and education of Alexander, David, and Davida Littlejohns, her children, to the extent of L. 107.

Isabel, the second daughter, married John Stenhouse of Glenquoyn. And although the match was by no means agreeable to Mr Innes, yet he advanced to them, at sundry times, the sum of 1200 marks; and in 1737 he paid Mr Stenhouse 3000 marks more, by way of tocher.

Margaret, upon her marriage with Mr Archibald Hart in 1735, received 3000 marks likewise as her tocher.

In 1736, Mr Innes paid the like sum with Janet his fourth daughter, upon her marriage with Mr Mercer.

Joan, the youngest, was married to William Taylor writer in Edinburgh, without her father's consent. But upon a postnuptial contract of marriage being executed betwixt them, in July 1751, Mr Innes disposed to Mr Taylor two dwelling-houses in the Old Assembly close; and further granted bond to him for L. 240 Sterling; which was accordingly paid 19th February 1755.

The whole daughters, but the eldest, having thus received what
was

was judged to be a competent share of their father's effects, at the same time discharged their father in the most full and ample manner of all that they were entitled to ask or claim by or through their mother's contract of marriage: Isabel, by her postnuptial contract of marriage in 1737; Margaret, by her contract of marriage in 1735; Janet, by her contract in 1736; and Joan, by a separate discharge granted to Mr Innes 10th July 1751.

Besides the above provisions from their father, each of the children of the first marriage received upwards of L. 500 Sterling, as their share of their grandfather's effects; of which Mr Innes took the management for behoof of his children.

In 1739, Mr Innes intermarried with the defender Isabel Inglis. By this second contract of marriage, Mr Innes became bound to provide the sum of 16,000 merks, besides his wife's tocher, which was 4000 merks, to himself, and the said Isabel Inglis his promised spouse, and the longest liver of them two, in liferent; and to the child or children to be procreate betwixt them, in fee. But by a subsequent clause in the contract, recited in the petition, it is provided, That if any part of this 4000 merks which Mr Innes was to receive as tocher, should not be recovered, the wife's liferent, and provision to the children, should suffer a proportional abatement. And in fact one hundred pounds Sterling of her portion was only recovered by Mr Innes.

As there was little prospect of issue by this marriage, Mr Innes being now arrived at his 60th year, little attention seems to have been bestowed, by the contracting parties, upon making suitable provision for the children of the marriage. Not one farthing was provided to children, except what was subject to their mother's liferent.

Contrary to all expectation, however, no less than *eleven* children were born of this marriage; and of these, six are still alive.

Upon perceiving this unexpected increase of his family, Mr Innes had too much good sense not to observe the defect in the contract of marriage. If Mr Innes should happen to die before these numerous children arrived at years of maturity, an event which his advanced period of life gave the justest reason to apprehend; it was easy to foresee to what a melancholy situation they must be reduced. A sum not very considerable provided to them, that sum totally life-rented, and in the mean time not a single farthing for their maintenance, education, and for setting them out in life, except what their

their mother should be able to spare out of a moderate annuity. Mr Innes himself was fully sensible of all this. He seems to have considered it as a very important duty incumbent upon him, to provide in a suitable manner for his growing family. And, upon these motives, he at different times executed deeds in their favour.

Thus, on the 24th August 1747, he disposed to his younger children of this second marriage, *viz.* Charles, George, David, and Archibald Innes's, and to Allan and Thomas Innes, both since dead, a dwelling-house belonging to him in the Cowgate. And the disposition proceeds expressly upon the narrative, "That he
" was sensible the sum provided to the children betwixt him and
" Isabel Inglis his present spouse, was too small; and that there-
" fore it was most reasonable, that it should be augmented, and
" that it was his duty so to do."

Upon the same narrative, he, on the 26th August 1747, disposed to his children above named, a tenement of land in Borthwick's close. And this disposition contains the following clause:
" Declaring always, as I hereby expressly declare, That this pre-
" sent right and disposition in favours of my said children and
" their forefairs, and another made by me in their favours, dated
" the 24th day of this current month of August 1747, of the fifth
" story of the tenement of land lying upon the north side of the
" Cowgate of Edinburgh, and to the east of the meal-market
" thereof, are, over and above, and but prejudice of the sums of mo-
" ney provided to the children by the contract of marriage before
" mentioned betwixt me and the said Isabel Inglis, so that they
" are not only to have the benefit of the said two dispositions, but
" also fully and effectually to draw the sum provided to the chil-
" dren by the said contract of marriage; the one but prejudice of
" the other in any sort."

On the 3d April 1753, Mr Innes disposed to the six defenders, his share in the Edinburgh sugar-house.

Upon the 24th of the same month, he conveyed to them, all gold and silver, bank-notes, and other current specie of ready money that should be found by him, or in his custody, at his death.

And, upon the 16th July 1759, he disposed to them a lodging in Blackfriars wynd.

Mr Innes did not communicate these deeds to any person. They were not even known to his wife and family, till they were found in his repositories after his death.

Although

Although by these deeds some addition was made to the provisions stipulated, in the second contract of marriage, in favour of the children of that marriage; yet the whole when divided among six children, none of whom were in a way of doing for themselves, except the eldest, and burthened with their mother's annuity, was still insufficient, and bore no proportion to the provision made for the children of the first marriage, all of whom were now settled in the world, and in comfortable circumstances. Mr Innes seems therefore to have still kept up his intention of making additional provisions from time to time in favour of his younger children.

In November 1763, Mr Innes was attacked with a very severe fit of the palsy; a distemper, which, joined to his great age, gave an alarm to himself, and to all his friends. He now saw that it was in vain to delay any longer; and that whatever share of his effects he proposed to give to the children of the second marriage, must be settled upon them at once.

A short time after his recovery, Mr Innes accordingly took the resolution of making a total settlement of his affairs. The person who was naturally pitched upon to frame the settlement, was Charles Livingston writer in Edinburgh, an acquaintance of Mr Innes's own, and a relation of his wife. A message being sent to Mr Livingston for that purpose, Mr Innes gave him a note wrote with his own hand, expressing the manner in which he meant to dispose of his effects, and according to which he wanted that a formal deed should be drawn up. Mr Livingston took the note home with him, and drew up the scroll of a deed, as thereby directed; which being afterwards read over to Mr Innes, and corrected and approved of by him, the deed was extended in proper form, containing, *inter alia*, a power to alter at any time of his life, and a dispensation with the delivery; and it was then duly signed and executed by Mr Innes, in presence of witnesses, on the 21st February 1764.

By this deed Mr Innes settled upon the children of the second marriage, all his houses in the town of Edinburgh therein particularly enumerated, together with his whole moveables; but burthened with the payment of all his debts, of their mother's liferent, and of an annuity of L. 108 Scots to Alexander Innes the pursuer, the eldest son of the first marriage.

The deed, upon being executed, was kept by Mr Innes himself; and it was found in his repositories after his death.

Mr Innes, at the time of executing this deed, and for many months after, having recovered of his last fit of the palsy, was in his ordinary state of health, going abroad daily, collecting his rents, and managing his affairs as usual.

Mr Innes died in the month of March 1765, being above a year after his executing the said deed.

Alexander Innes, the eldest son of the first marriage, who had already received out of his father's effects very near double of what was bestowed by this settlement upon six younger children, has taken it into his head to be highly offended with it. Alexander's plan was, that his father should make him an independent country-gentleman, and leave all the rest of his numerous family to shift for themselves; and because his father has disappointed this ambitious project, by settling his effects upon a more rational plan, he therefore wants to prove the old man out of his senses, and to deprive him of the privilege of judging in this matter at all. A reduction has accordingly been executed in name of Alexander Innes of this settlement of the 21st February 1764, upon two separate grounds. *1mo*, That the conquest of the first marriage, which was by a particular clause provided to himself and the children of that marriage, had been encroached upon by the settlement under reduction; and, *2do*, That Mr Innes, at the time of making it, was not of a disposing mind, and incapable of making any settlement at all.

After some proceedings in this action, the parties entered into a submission to Lord Hales and the present Lord Advocate; and a proof was adduced on both sides by authority of the arbiters. But the submission having been allowed to expire by a particular accident, the pursuer absolutely refused to enter into a new one.

A judicial determination being thus rendered necessary, the Lord Elphinstone Ordinary, to whom the cause was remitted, in place of the late Lord Nilber, of this date, pronounced a judgment, repelling both the reasons of reduction. And to this judgment his Lordship has since adhered by repeated interlocutors.

The cause is now brought before your Lordships by a reclaiming petition for the pursuer; and the defenders, upon their part, humbly submit the following answers.

The first reason of reduction is thus stated in the petition: " That the children of the first marriage, *qua* creditors in their mother's marriage contract, had right to the whole conquest of that marriage :

riage: That the petitioner, upon the rights conceived in his favour, is entitled to whatever subjects of that conquest were not particularly allotted to the other children of the marriage; and that he could not be deprived of this right, by any gratuitous deed of the father: That this deed under challenge, therefore, falls to be reduced, as the only subjects conveyed thereby to his second wife and children, were conquest during the subsistence of the first marriage."

To this ground of reduction, founded upon the clause of conquest, there occur no less than three answers; each of which the respondents apprehend to be separately relevant.

1mo, It is an established point, That, notwithstanding a clause of conquest, a father is at liberty to encroach upon the conquest, in order to make rational provisions in favour of the children of a second marriage; such provisions being justly regarded as an onerous and necessary deed upon the part of the father. Ans. I.

This power is indeed necessarily implied in the nature of a clause of conquest. A clause of conquest does not give the children of the marriage a direct *jus crediti*, but only a *spes successionis*. And the subjects must be taken up by them by service, as heirs of provision to their father. It would seem to follow therefore, that children succeeding by virtue of a clause of conquest, must, as representing their father, be bound to make good all his deeds without distinction. However, as they are also in some sense creditors to their father, they are found entitled, upon that footing, to set aside his deeds affecting the conquest, except what are onerous and rational. All this is so clearly established in your Lordships practice, that it is unnecessary to argue upon it.

The general principle, That a father is not restrained from granting rational provisions to the children of a second marriage, by an ordinary clause of conquest in favour of the children of a former marriage, does not seem to be called in question by the petitioner himself. But he argues, that this power of the father can only take place where the children of the second marriage are altogether unprovided for; and that no instances occur of a father being allowed to burthen conquest provided to children of a first marriage, by additional provisions to children of a second marriage, who were already provided by a marriage-contract.

The respondents do not see that this circumstance can have the least weight with your Lordships. The nature of the provision made

to the respondents by their mother's contract of marriage, has already been explained. The sum is inconsiderable; and the whole is liberented by their mother. Under these circumstances therefore there cannot be the least doubt, that to make a suitable provision to the respondents, besides what their mother liberented, was a proper and rational deed upon the part of Mr Innes, as much as if no second contract of marriage had existed. The petitioner likewise is under a mistake, when he says, that no instance of this has ever occurred in your Lordships practice. In a case decided 9th February 1669, Cowan *contra* Young, a bond of provision to a child of a first marriage, who had before that got from her father a certain tocher, which she and her husband had accepted in satisfaction of all she could ask or claim, was sustained against the children of the second marriage, founding upon a clause of conquest; the bond being considered as a rational deed, and not done *in fraudem* of the obligation of conquest.

But, says the petitioner, Mr Innes himself has expressly declared in the marriage-contract, what he judged would be necessary for all the purposes of that marriage; and he cannot now be allowed to make any farther encroachment. This matter has been already explained. It may be true, that Mr Innes, at the time of his second marriage, imagined that the sum contained in the contract was fully sufficient. To provide a suitable jointure for Mrs Innes, seems to have been the chief object which the parties had in view. Indeed what expectation could Mr Innes, or any mortal, have, that entering into a second marriage in his 60th year, he was to live to see himself the father of no less than eleven children born of that marriage? What was therefore judged a suitable provision at the time of the marriage, must, upon the unexpected birth of so numerous an offspring, have become a very unsuitable one.

The argument upon this head therefore still returns to the question, Whether do the subjects settled upon the respondents by the deed under reduction, exceed the bounds of a rational provision, or not? The value of the houses conveyed to the respondents by this deed, as estimated upon oath by Mess. Mylne and Brown architects in Edinburgh, together with the stock in the sugar-house, formerly disposed to the respondents by their father, amounts only to L. 2808 Sterling. And when from this is deduced the amount of the several burthens, the remainder, as will appear to your Lordships from the following short sketch, is only L. 1248 : 15 : 6 Sterling.

Thus

Thus the value of the houses in Edinburgh is $L. 2708 \ 0 \ 0$
 Stock in sugar-house $- \quad - \quad - \quad 100 \ 0 \ 0$

 $L. 2808 \ 0 \ 0$

And, on the other hand, this deed is
 burthened with the payment of all
 his just and lawful debts, which, by
 a state produced, amount to $L. 511 \ 8 \ 11\frac{2}{3}$
 2^{do}, With 1400 merks of jointure to
 Mrs Innes, which, at ten years pur-
 chase, is $- \quad - \quad - \quad 777 \ 15 \ 6\frac{8}{12}$
 3^{to}, With the liferent of a house in
 Carrubber's close to her, which gives
 of yearly rent $L. 18$, and which,
 at ten years purchase, is $- \quad 180 \ 0 \ 0$
 4^{to}, With an annuity of 108 Scots to
 the pursuer, which, at ten years
 purchase, is $- \quad - \quad - \quad 90 \ 0 \ 0$

 $1559 \ 4 \ 6\frac{2}{3}$
 Rests $L. 1248 \ 15 \ 5\frac{7}{12}$

This sum of $L. 1248$, your Lordships will observe, is to be di-
 vided amongst six children, being about $L. 200$ to each of them.
 It is submitted therefore, whether this provision can be set aside as
 irrational or extravagant: Mr Innes being a person in good circum-
 stances, his eldest son having received for his patrimony a land-
 estate, and all the other children of the former marriage having
 been already provided for, and comfortably settled in the world.

The petitioner, it is true, in a state annexed to the petition,
 makes the amount of the subjects disposed to the respondents to be
 $L. 3908$. But the manner in which he makes this out, is by stat-
 ing only the value of the subjects left by Mr Innes, without men-
 tioning one word of the debts due by him, and the other burthens
 with which these subjects are charged.

He has likewise stated $L. 200$, as the value of a furnished house
 and silver plate, although Mr Innes's furniture was not worth half
 that sum; and, whatever be its value, it stood provided to his wife,
 Mrs Innes, by her contract of marriage; and consequently cannot
 be taken *in computo* as part of her childrens provisions. Neither can
 the $L. 200$ given to the respondent Charles Innes, as his stock in
 C trade,

trade, when he entered upon buiness several years before his father's death, be properly stated in this account, as it is no part of the subjects or effects which the respondents take in virtue of the deed under challenge. And as to the other two articles in the petitioner's account, of L. 400 principal and L. 300 interest due by two bonds of the petitioner himself to his father, the respondents have not yet had access to inform themselves particularly as to the circumstances and amount of these debts. But supposing that their amount, as stated by the petitioner himself, is to be added to the sum above mentioned of L. 1248 : 15 : 5, they would only increase the total to L. 1948 : 15 : 5 ; which, when divided among the six children, is but a trifle above L. 300 Sterling to each.

The petitioner has also exclaimed against the inhumanity of leaving unprovided for the three Littlejohns, Mr Innes's grandchildren by his eldest daughter Grizel. The fact is, that one of the three was dead at the time of executing the settlement, and the other two were settled in life, particularly the eldest, who resides in Jamaica, and is in extreme good circumstances. Mr Innes had been at the whole expence of their education ; and Grizel herself had received, along with Mr Innes's other children, a considerable sum from her grandfather's succession.

Ans. II. 2dly, The respondents do maintain, in the next place, That the full value of the conquest of the first marriage had before this, at different time, been distributed amongst the children of that marriage. This obligation therefore being completely satisfied, Mr Innes had the full and entire disposal of all that remained of his estate.

In order to satisfy your Lordships that this is the case, there is hereto annexed a state of the conquest at the dissolution of the first marriage, and of the subsequent provisions made by Mr Innes to the children of that marriage, in different views : From all of which it appears, that the conquest was considerably more than exhausted by what was given, at different times, to the children of the first marriage.

It seems unnecessary here to enter minutely into all the different objections which the parties have made to each other's calculations upon this subject. The respondents shall only mention one or two things which appear to be most material.

1stly, With regard to the extent of the clause of conquest in this case,

case, the respondents have maintained, that it only comprehends lands and heritable subjects; but that moveable debts or sums of money do not fall under it. The words of the clause are: "*That whatsoever lands, heritages, annualrents, and others, he shall happen to conquest and acquire during the first marriage betwixt him and the said Margaret Herriot, his future spouse, he shall provide the same, and take the bonds and securities to be made and granted therefor, to and in favours of himself, and the children of the marriage, &c.*"

This clause, it seems evident, cannot be construed, so as to comprehend moveable debts. The expression "others" must plainly mean others of the same kind, *i.e.* heritable debts. Accordingly, in a similar case observed by Lord Marcus, "it was found, that an obligation in a contract of marriage to provide the wife to an annualrent of what lands, teinds, annualrents, &c. not mentioning sums of money, should be conquest during the marriage, was found not to extend to the annualrent of moveable sums. February 1682, Aitken." The petitioner has laid hold of the word "bonds" which occurs in this clause, as applicable to moveable debts. But it is more natural to suppose, that heritable bonds were here in view; the subjects for which these bonds and securities were to be taken, being explained, by the preceding part of the clause, to be lands, heritages, and others. If your Lordships shall be of opinion, that moveables are not comprehended under this clause of conquest, the conquest of Mr Innes's first marriage will, in this view, be overpaid to the children of the marriage, by the sum of $L. 3149 : 7 : 8\frac{1}{3}$ Sterling. And even although moveables are included, the obligation of conquest is more than satisfied by $L. 2659 : 14 : 1\frac{1}{3}$ Sterling.

2do, Another thing disputed between the parties, is, Whether the respondents, in order to extinguish the obligation of conquest, are entitled to state the rents of the lands of Cathlaw from the time that they were disposed to the petitioner, and if they can state interest upon the sums advanced by Mr Innes to the other children.

This point the respondents apprehend to be attended with very little difficulty. It is an undisputed point, that, both by the nature of an obligation of conquest, and from the particular conception of it in the present case, such an obligation is only prestable at the father's death. It is equally clear, that the amount of the conquest must be stated as at the dissolution of the marriage; and
that

that the growing rents and interest arising due after that period, do not fall under the obligation. Mr Innes might most unquestionably, notwithstanding the obligation in his first contract of marriage, have retained in his own hands the whole subjects of the conquest during his life. And had he done so, the rents and interest falling due after the dissolution of the first marriage, would have been entirely at his own disposal; and would have afforded him an unexceptionable fund for providing the children of the second marriage. If therefore Mr Innes has made over to the children of the first marriage a fund which fell not under the conquest, it seems unavoidably to follow, agreeable to that maxim of law, *Delictum non præsumitur donare*, that this must be imputed to extinguish *pro tanto* the obligation which Mr Innes was under to make good to them the conquest itself. If the respondents are allowed to state the interest, the conquest is overpaid by $L. 6484 : 13 : 5\frac{1}{2}$ Sterling. If interest is not stated, the amount of the overpayment is reduced to $L. 2659 : 14 : 1\frac{1}{2}$ Sterling.

It does not seem necessary, in this shape of the cause, to enter more minutely upon calculations of this kind. The errors committed by the petitioner in the states which he has subjoined to the petition, are indeed some of them pretty extraordinary. Thus, for instance, he states the value of the conquest at the dissolution of the marriage at $L. 5607 : 15 : 6$. But here, according to custom, he only states the amount of the effects, without deducting one farthing upon account of debts; although the debts due by Mr Innes at the dissolution of the first marriage, which must be deduced from the conquest, and which are clearly instructed by vouchers in process, amount to no less than $L. 1653, 12 s.$ Sterling. In like manner, when stating the amount of the payments made by Mr Innes to the children of the first marriage, he states only $L. 166$ as given to the youngest daughter Joan. The fact is, that Joan received no less than $L. 408$ Sterling. The petitioner has indeed said, that part of this sum was upon account of effects left by her grandfather, and with which Mr Innes had intromitted. But it appears clearly from Mr Taylor her husband's discharged bond, and scroll of the disposition by Mr Innes to him, produced in process, that this sum of $L. 408$ was given her as her patrimony, from his own estate, and was quite distinct from any claim that she had against her father, upon account of her grandfather's succession; for which Mr Innes separately accounted to her and his other children

children of that marriage, as appears from vouchers in process.

3^{tio}, Your Lordships have already been informed, that no less than four of Mr Innes's daughters of the first marriage, upon receiving certain provisions from their father, discharged him, in the most full and ample form, of any thing further that they were entitled to claim by and through their mother's contract of marriage. Although therefore the whole conquest should not have been exhausted; yet, if the petitioner himself has received his full share of that conquest, he has no title to complain; and the effect of these discharges must be, to give Mr Innes himself the free and absolute disposal of the surplus, if any surplus was. Ans. III.

That the petitioner has in fact received from his father greatly more than a rateable share of the conquest, does not seem to be denied. Taking the conquest, according to the petitioner's own account of the matter, to be *L.* 5607 : 15 : 6, without deducing any thing upon account of debts, although Mr Innes was indebted in very large sums; and stating the lands of Cathlaw at no more than *L.* 1027 : 15 : 6, although, by the improvements which Mr Innes made upon them after the dissolution of the marriage, they are worth three times that sum; it is undeniable, that the petitioner has received more than a seventh part of the conquest, which is all that he was entitled to; there having been seven children of the first marriage.

Neither has the petitioner pretended to dispute the general proposition here founded upon by the respondents, that the legal operation of the discharges granted by the daughters was, to give their father the absolute disposal of the residue of the shares falling to them, who so discharged their father; and not thereby to augment the shares of the other children; as indeed it would have been hardly decent to have argued upon a point which was so recently established by your Lordships, in the case of Sinclair against Sinclair, with great deliberation, and after the fullest hearing of the cause. The respondents have accordingly annexed a third state of this conquest, upon the plan of that decision; whereby they give Mr Innes credit for the four sevenths falling to the four daughters, who discharged him; and they show, that the payments made to the petitioner himself, and the other two children who did not grant discharges, do exceed the three sevenths falling to them, in the sum of *L.* 104 : 8 : 9 Sterling.

The only thing in the petition attempted on this head, is, to

establish a distinction betwixt this case and those of Sinclair and Allardice, where the general point was determined. The petitioner maintains, that his father having taken the rights of the houses in Edinburgh to himself and his heirs whatsoever, this must be understood to be a special allotment of these houses in favour of him the eldest son and heir whatsoever. And a decision of your Lordships is appealed to, Campbell *contra* Campbell, 16th December 1738; where it is said, that this precise point was determined by the court. And this being once established, a long argument is maintained, in order to prove, that Mr Innes could not afterwards encroach upon this allotment, by making a settlement of the subjects upon the children of a second marriage.

This proposition, which is the foundation of the petitioner's whole argument, and which he seems to take for granted as clear and incontrovertible, is a very new, and, the respondents will be pardoned to say, a most extraordinary idea. A right to any subject taken to a person himself, *his heirs and assignees whatsoever*, is understood to be that which, of all others, gives the proprietor the most complete and absolute power of disposal. If the destination remains unaltered, and if the proprietor executes no deed relative to these subjects, they will no doubt descend in the ordinary course of succession to his eldest son, or other heir at law. But it was never dreamed of till now, that the heir at law had thereby any *jus quæsitum*, which might not be altered, revoked, or affected at pleasure. The only method, on the contrary, by which the heir at law can establish a title to these subjects, is by a service as heir whatsoever; which of course makes him liable to all his predecessor's deeds, without distinction whether onerous or gratuitous. The very reason which induced Mr Innes to take the rights to the houses in this manner to himself, his heirs and assignees whatsoever, was, because he had not yet determined what particular allotment to make to his several children, and meant to retain the absolute disposal of them in his own hands. Where a person purchases a subject, if he has already come to a final resolution about disposing his effects, he may allot that subject to any particular child, *nominatim*. But if he means to make no allotment, and wants to retain every thing in his own power, which most commonly is the case, it is asked, by what form of law can this possibly be done, except by taking the rights, as Mr Innes did, to himself, his heirs and assignees whatsoever?

If

If the petitioner be right in maintaining, that the taking the right to an heritable subject to heirs whatsoever, imports an allotment of that subject in favour of the eldest son, who is the heir, the same rule will apply to moveables also : and the taking a bond to heirs, executors, and assignees, must import a special allotment in favour of the younger children, who are the natural heirs *in mobilibus*. At this rate therefore it is impossible for a person who is under an obligation of conquest to the children of a marriage, to reserve to himself the power of dividing during any time of his life. So soon as a subject is acquired, unless it is at the very time appropriated to a particular child, it must immediately, by the operation of the petitioner's principle, accrue as an allotment either to the eldest son or to the youngest children, according to the nature of the subject. The petitioner has indeed said, that this allotment may afterwards be altered by the father. But this appears to be a mistake. If the taking a right to heirs whatsoever imports an allotment of that subject to the eldest son, or to any other of the children, the respondents do absolutely deny that this could afterwards be altered by the father, more than if the allotment had been made by an express conveyance.

It is a rule of law inculcated by all our lawyers, That in obligations of conquest, or other obligations to the children of a marriage, if the father does not exercise the power of dividing in his lifetime, an equal division takes place amongst the whole children. But, according to the doctrine advanced in the petition, this is a case which could never once occur. Where a person acquires subjects, he must either take the rights of them to a particular species of heirs, or to heirs whatsoever. If a special destination has been made, that destination must be the rule, and consequently the rule of an equal division cannot take place. And if the rights are taken in common form to heirs whatsoever, neither can an equal division be observed here. Because the taking the rights in that manner, must be understood to import an express allotment either in favour of the eldest son, or of the younger children, according to the nature of the subject. Put the case, that a person bound by a clause of conquest, acquires right to an heritable subject, the right whereof he takes in common form to himself, and heirs whatsoever ; and that this is the only conquest of the marriage ; it has always been understood as an undoubted point, that if there has been no express division, the subject would fall to be equally divided amongst all the children.

But,

But, according to the plea advanced in the petition, the subject would fall entirely to the eldest son as the heir whatsoever; and the only remedy left for the younger children, would be an action before this court for setting aside this implied allotment, so as that they themselves may not be entirely excluded.

One thing which is very material, the petitioner does not seem at all to have adverted to. If he claims under the clause of conquest in the contract of marriage, he is thereby entitled to no more than an equal share with the other children. But if he pretends to claim under the destination of the subjects to heirs whatsoever, he can only take up that right by service, as heir whatsoever to his father; which of course must subject him to all his father's debts and deeds, without distinction, whether onerous or gratuitous, and at once put an end to the question.

With regard to the decision *Campbells contra Campbells*, that case seems to have been appealed to somewhat inadvertently. It is said in the petition, that in that case a father under an obligation of conquest to the children of a marriage, having taken the rights of a land-estate, which was the whole subject conquest, to heirs whatsoever; your Lordships found, that he might, and did thereby allot that estate to his eldest son. But the fact is, that your Lordships found no such thing. In that case, not only were the rights of the estate taken to heirs whatsoever, but there was also an express deed of the father, settling his whole effects, both heritable and moveable, upon his eldest son. So the circumstances of it are expressly stated in the Dictionary, *see* Provisions to heirs and children. “Colonel Campbell being bound
“in his contract of marriage to secure the sum of 40,000 merks,
“and also the conquest during the marriage, to himself and
“spouse in conjunct fee and liferent, and to the children to
“be procreated of the marriage, in fee, did purchase the estate of
“Burnbank during the marriage, taking the rights thereof to
“himself, his heirs and assignees; and, upon death-bed, *did execute a deed, settling both the heritable and moveable estate upon his*
“*eldest son*, with the burden of certain provisions in favour of the
“younger children. *In a reduction of this settlement* at the instance
“of the younger children, it was pleaded for them, That they
“were creditors *per capita*, each entitled to an equal share. And,
“supposing the father to have a power of division, it was irrational to leave the whole to one, burdened with small provisions
“in

“ in favours of the rest. It was pleaded in behalf of the defend-
 “ er, That an obligation granted *familia*, makes the family, as
 “ a body-politic, creditor, so as to restrain alienations *extra fami-*
 “ *liam*; but does not make each a creditor *per capita*, to restrain
 “ the father from giving the whole to any one he pleases. The
 “ Lords found, That each of the children are entitled to a share
 “ in the special sum and conquest, but that the father had a
 “ power of division of the sum and conquest, in such manner as
 “ might be found rational; and therefore that he might lawfully
 “ acquire a land-estate, and take the rights thereof to his eldest
 “ son, and might also dispoise his moveable estate to him, with
 “ the burden of rational provisions to his younger children.” The
 material circumstance which occurs in this case of an express set-
 tlement upon the eldest son, seems to have been entirely overlooked
 by the petitioner. And although the settlement was executed on
 deathbed, yet as it was made in favour of the heir himself, no ob-
 jection could have lain against it upon that head. As the petitioner
 therefore has failed in showing, that there was an express allot-
 ment of the subjects in his favours, it is unnecessary to follow him
 throughout the rest of his argument, or to say what would have
 been the law, if any such allotment had existed.

The petitioner, in the course of his argument, has observed,
 that this case affords a striking instance of the dangers foretold by
 some of your Lordships at advising the case of Sinclair of Southdun,
 of a father being prevailed upon, by the importunities of a second
 wife, to lay hold of this plan of procuring discharges in order to
 defraud the children of a first marriage. It happens however a
 little unfortunately for this observation, that all the discharges
 which Mr Innes took from his daughters, were long prior to his
 second marriage, except the one granted by Joan, the youngest
 daughter; and that too was so far back as the year 1751, when it
 will not be pretended that Mr Innes was liable to be influenced by
 undue importunities.

The respondents shall now proceed to consider the second ground
 of reduction, founded upon the alledgeance that Mr Innes was in a
 state of incapacity at the time when he executed the deed under
 challenge, and the proof adduced in support of that alledgeance.
 An *ungracious* plea the petitioner himself has very justly termed
 it; and the respondents are hopeful to satisfy the court before
 they have done, that it is no less ill founded than it is ungracious.

Second
Reason of
Reduction.

The petitioner has branched out this part of the cause into three articles, each of which shall be considered separately.

Art. I.

1mo, An attempt is made to satisfy your Lordships, that the deed under reduction, was contrary to all the previous intentions and purposes of Mr Innes, with regard to the settlement of his effects.

The plan of settlement which the petitioner wants that his father should have adopted, was, to accumulate his whole fortune upon the petitioner, to make him a gentleman, and allow all the other children to starve. He has taken care to inform your Lordships, that his younger brother was bred a merchant, thereby giving to understand that he himself was bred to nothing; and that his father meant originally to make him an independent country-gentleman, and to bestow upon him a suitable fortune. The fact is, that this absurd idea never once entered into the old man's head. Mr Innes was married very early in life, and was soon encumbered with a very numerous family. All that he was worth, would not have been sufficient to maintain one of his sons in the character of a man of fortune, who was to do nothing. The petitioner was accordingly educated to the business of a writer, although he himself seems now to have forgot this part of his history. And as evidence of the fact, if it shall be disputed, the respondents appeal to a contract of indenture, produced in process, which bears to have been wrote by the petitioner, under the express designation of *writer in Edinburgh*; and to a contract of marriage, which bears also to be wrote by him. His father afterwards put him to the business of a merchant; but neither of these professions having been suitable to his fancy, his father allowed him to retire to the country, and gave him the lands of Cathlaw as his patrimony. With what justice, therefore, can he murmur against his father, because he did not, and more could not bestow upon him a fortune, sufficient to support him in a character which was entirely of his own chusing?

The petitioner says, "That his father was always sensible of his obligation, both in justice and humanity, to make him his *heir*, (*i. e.* as he afterward explains it, to give him every farthing that he had); and that he could not, consistent with equity, put his estate past him."

The petitioner's pretensions, in point of justice, were considered under the former head. In point of humanity, his plea is altogether incomprehensible. The situation of the children of the second marriage,

marriage, if Mr Innes had not made some additional provision, by making a settlement upon them, has already been explained. The children of that marriage were very numerous; and Mr Innes had bestowed upon all of them, an education suitable to his station in life. The respondents therefore apprehend, that it was a duty incumbent upon Mr Innes, to make provision for them out of his effects, in such a manner, as would be sufficient to set them out in life, and afford them the means of earning a comfortable livelihood in their several professions. This Mr Innes has accordingly done, by the settlement under reduction; and it has been already shewn, that he has done no more. The petitioner must indeed have conceived very exalted ideas of the prerogatives of primogeniture, if he has seriously brought himself to believe, that, by so doing, his father had violated any one rule of justice, or principle of humanity.

The first piece of evidence appealed to by the petitioner on this head, is the disposition of the estate of Cathlaw, and the settlement of moveables in his favour, executed by his father in 1740.

But at the time of executing these deeds, Mr Innes, it will be observed, had no children by the second marriage. It was nowise wonderful, therefore, that his plan of settling his effects should vary much, after he came to see himself the father of a numerous family by that marriage. The settlement of moveables here mentioned, is merely a testament, naming the petitioner as executor, and contains a power of alteration, and a clause dispensing with the delivery. It is not very common for a deed of this kind to be delivered during the granter's lifetime; nor have the respondents as yet heard any satisfactory account how this deed came into the petitioner's hands. The account given by him in the petition, that it was delivered to him by his father, along with the disposition to the estate of Cathlaw in 1742, cannot possibly be true. The disposition to the estate of Cathlaw was delivered to the petitioner so far back as the year 1740, as appears from a receipt under his own hand produced in process; and the disposition was registered by him in 1741.

The next piece of evidence is a docket or codicil, bearing date 18th July 1758; part of which is recited in the petition.

The respondents see, that, in this codicil, Mr Innes gives the petitioner the appellation of *his eldest son and heir*. The first of these he unquestionably was; and the latter appellation might very properly

properly be given him, as he inherited the lands of Cathlaw, which were the most valuable part of Mr Innes's succession. The respondents can by no means enter into the petitioner's idea, that, in order to entitle him to be called his father's heir, it was absolutely necessary that he should inherit his father's whole effects, heritable and moveable, to the exclusion of all the rest of the children. Mr Innes, by this codicil, likewise appoints the petitioner, to make payment of L. 2000 Scots to his grandchildren, Alexander, David, and Davida Littlejohns. It is very possible, that, at this time, Mr Innes had thoughts of continuing to the petitioner the office of executor; in which capacity it was natural to appoint him to make payment of this provision to his grandchildren.

The petitioner, in the third place, founds upon the evidence of Agnes Bell, one of Mr Innes's tenants, and of Margaret Gray, a maid-servant.

With regard to the first of these, it is hardly thought, that an overy conversation passing betwixt a landlord and one of his tenants, who had no title to inquire about the matter, will be regarded as evidence of the landlord's private resolutions in the settlement of his affairs; a circumstance which few persons chuse to disclose, even to their most intimate friends. One thing mentioned in the deposition of this witness, directly contradicts what the petitioner is attempting to prove by it. When this tenant was very improperly insisting with Mr Innes, to purchase a shop for his son Charles, the eldest of the second marriage; Mr Innes made answer, " That he had already given him a stock, and set him up " in trade; and that he Mr Alexander Innes *had a great many* " (meaning the respondents) *to provide for*; and his son had a numerous family." This surely implies the direct contrary of his intending to leave every thing to the petitioner. As to the expression of Mr Innes mentioned in the deposition of Margaret Gray, the other witness, quoted upon this head, it is plain, that she must have been under some mistake. Mr Innes could never possibly say to his wife, that he got nothing with her; the fact being, that he received with her a portion of L. 100 Sterling, and not 1000 marks, as the petitioner has elsewhere alledged.

The last piece of evidence founded upon, is a note wrote by Mr Innes upon the back of a burial-letter, which is dated 7th June 1763.

This note or scrawl contains nothing more than a ratification of the

the dispositions formerly made by Mr Innes, to the children of the second marriage, of the houses in Edinburgh, acquired during the subsistence of that marriage. The reason of writing this scroll was, that some of the younger children were born after the date of the particular dispositions. In order therefore that they might not be excluded, Mr Innes has declared, " That all my sons, brothers, of this my present marriage with Isabel Inglis, my wife, be, immediately after my death, equally interested and concerned in all and every one of my houses belonging to me within the city of Edinburgh." But there is not one word in this scroll, declaring that Mr Innes had formed a resolution of giving the children of the second marriage no more than what had been formerly disposed to them, or of settling every thing else upon his eldest son.

The respondents, on the other hand, must beg leave to appeal to evidence undeniable, that, with regard to the houses in Edinburgh, which are the chief subject in dispute, and which the petitioner seems to consider as an inheritance set apart for himself, sacred and inviolable, Mr Innes was, from the beginning, resolved to settle them in a very different manner. There was found in Mr Innes's repositories, a scroll of a disposition made out in 1733, before Mr Innes had any thoughts of entering into a second marriage, conveying the greatest part of these houses in favour of the four daughters of the first marriage; and from a discharged account by one Alexander Hay writer, wherein is stated an article for extending this disposition, it appears to have been actually executed. This disposition must, indeed, have been afterwards cancelled by Mr Innes; but at what time and upon what occasion, the respondents cannot say. This circumstance alone seems at once to put an end to the pretensions of which the petitioner seems to be so fond, of a kind of hereditary indefeasible right to these houses.

But supposing the petitioner had clearly proved, which he is far from having done, that his father's intentions once were, that the children of the second marriage should be restricted to the provisions in their mother's contract of marriage; and that the rest of his effects should be settled upon the eldest son of the first marriage; the respondents would be glad to know, what earthly influence this circumstance could have upon the present question. In order to avail himself of it, the petitioner is under a necessity of maintaining one of two things, either that a person who has once formed intentions with regard to the settlement of his affairs, is

not thereafter at liberty to alter those intentions, although his own circumstances and situation in life be altered ever so much ; or that his doing so is to be regarded as *probatio probata* of his being in a state of incapacity, and unable either to think or judge at all.

Instead of proving that Mr Innes was at the time out of his senses, the respondents do, on the other hand, maintain, that the intrinsic evidence arising from the nature of the settlement itself, proves the direct contrary. And if Mr Innes had ever allowed himself to form the absurd project of sacrificing a large family of younger children to the vanity of making a rich laird of their elder brother, his laying aside that plan was one sign of his good sense and sound judgment. In Mr Innes's situation nothing indeed could have been more proper or natural than the settlement now under reduction. The whole children of the first marriage he saw by this time competently provided for. Besides the patrimony got from their father, they had each of them received between 5 and 600 l. out of their grandfather's succession ; and they were all comfortably settled in life. The children of the second marriage, on the other hand, if left entirely to the provisions in their mother's contract of marriage, even with the small additions which had been made from time to time by Mr Innes, would have been in a situation truly deplorable. They must have wanted even what was necessary for their education, and for establishing them in professions suitable to their station, on which they might be enabled to support themselves by the fruits of their honest industry. To give them what was sufficient for these purposes, was a duty incumbent upon Mr Innes, and upon every parent whose circumstances permit.

The settlement under reduction, therefore, which has given them such provision, and has given them no more, was one of the most proper and rational acts that Mr Innes could possibly do. It was indeed no more than carrying into execution those sentiments which he had always expressed, at a time when the soundness of his judgment is not called in question. One of the dispositions executed by him in 1747, contains this remarkable declaration : “ *Whereas* “ *I am sensible that the sum provided to the children by the contract of* “ *marriage between me and Isabel Inghis, my present spouse, is too small ;* “ *and that therefore it is most reasonable that it should be augmented,* “ *and that it is my duty so to do : Therefore, &c.*”

Art II. To proceed now to the positive evidence of Mr Innes's incapacity, which is, properly speaking, the only question on this part

of the cause: The respondents propose first to state the proof adduced upon their part, in order to show that their father was entire and found in his judgment, at the time of executing the settlement. And, in the second place, they shall consider shortly the evidence led by the petitioner, in order to instruct the contrary.

Before entering upon either of these, it may not be improper to observe, that the parties here do not at all stand upon an equal footing. The petitioner is the person upon whom the *onus probandi* entirely lies. The law presumes every person who is past the years of minority, and who has not legally been cognosced furious or fatuous by a verdict of his country, to be of a sound and disposing mind, capable of giving a valid consent, and understanding what he does; and will therefore give full effect to all his deeds, if executed in due and lawful form. It was therefore nowise incumbent upon the respondents to have proved any thing at all with regard to this matter. They might have stood securely upon their legal presumption, and rested satisfied with pointing out the invalidity of the proof adduced by the petitioner. At the same time they thought it would be more satisfying to the court, in the first place, to prove, from direct and positive evidence, both written and verbal, that their father's judgment was sound and entire at the time of executing the deed. And when this is done, your Lordships will be disposed to give the less credit to that multitude of nothings with which the petitioner's proof is filled, of circumstances trivial and childish to the last degree, and of mistakes incident to people of Mr Innes's advanced years, and many of them indeed to persons of any age, upon which this alledgeance of incapacity is attempted to be founded.

The evidence upon the part of the respondents is partly parole and partly written. The parole-evidence shall be first stated. Respondents Proof.

To the whole of this evidence the petitioner has ventured to make one or two preliminary objections.

Imo, He objects, " That it consists of the testimony either of persons connected or dependent on the respondents, or of persons who, seeing Mr Innes overly, or for a short time, without any particular business with him, had no occasion to observe his incapacity."

As a person at Mr Innes's advanced period of life has seldom much intercourse, except with his own family and his relations; it is not easy to see what witnesses it was possible for the respondents

to

to adduce, that did not fall under one or other of the branches of this objection ; either of being connected with the respondents, or of having had little opportunity to be acquainted with Mr Innes. The petitioner, in leading his own proof, has indeed taken care to keep clear of the first part of the objection ; because he has not examined a single witness who had occasion to know any thing about Mr Innes at this time. But the second part of the objection strikes against every word of his proof. It is composed, as your Lordships will see, of the testimonies of blacksmiths, barber-boys, and at best of Mr Innes's own tenants, whose only *causa scientiæ* was, that they paid him their rent twice a-year.

The second objection is, That the respondents have not proved particular instances wherein Mr Innes's capacity appeared.

That a person is entire in his judgment, does not appear from any one or two particular instances, but from the whole tenor of his conduct, and from every thing that he either does or says. Were a person called upon to give evidence with regard to the capacity or incapacity of any one of his acquaintance, it is a great chance if he would condescend upon any particular facts from which he inferred, that the person to whom the inquiry related, was in his senses. He would only say in general, that he had never observed any thing to the contrary. Where a man goes on in the ordinary train of people in their senses, it never enters into any person's head, to take particular notice of his actions. But where a man is out of his senses, every thing that he does or says makes an impression, and is remembered. The whole witnesses, even those adduced by the petitioner, have deposed, that Mr Innes appeared to them to be sound and entire in his judgment, and that they never observed any thing to the contrary. This was in effect deposing, that every thing which Mr Innes had either done or said in their presence, was the acting and discourse of a person in full possession of his judgment ; as any instance of the contrary must have immediately been taken notice of. It was unnecessary therefore to ask particular instances, as every one thing that Mr Innes either did or said in presence of those witnesses, was a separate instance of his being at that time entire in his judgment. Your Lordships will now judge of the proof itself.

Parole-evidence
Master-
servants.

1mo, The respondents appeal to the testimony of the two maid-servants who lived with Mr Innes at the time of executing the deed under reduction. As all the other persons who lived in family with

Mr

Mr Innes at the time, and who, by seeing him at all hours, and at all seasons, were best able to form a judgment of his real situation, are parties in the cause, and disqualified from bearing evidence; the testimony of the two maids, who were the only persons that had these opportunities, and can give evidence, must no doubt be regarded by your Lordships as the most important part of the proof. They are as follows.

Primrose Stewart depones, “ That she entered servant to the
 “ now deceased Mr Alexander Innes, at Whitsunday 1763, and
 “ continued in his family down to Whitsunday 1765, Mr Innes
 “ having died in March preceding this last term : and that she re-
 “ members, that during her service, but she cannot perfectly re-
 “ collect the time, only she thinks it was in the winter-season,
 “ that Mr Innes was seized with a severe fit of the palsy, in which
 “ he was bad for two days or so; but he recovered of this, and went
 “ abroad as usual. Depones, That she remembers once, that Mr
 “ Charles Livingston writer, being in her master’s house, Mrs In-
 “ nes ordered the deponent to go to the house of Mr Charles Brown,
 “ and desire John Edgar, one of Mr Brown’s clerks, to come to
 “ Mr Livingston, at Mr Innes’s house; which the deponent ac-
 “ cordingly did, and Mr Edgar came as desired : That the depo-
 “ nent had seen Mr Livingston frequently in her master’s house;
 “ and at this time when she was sent for Mr Edgar as aforesaid,
 “ Mr Innes, her master, was in his ordinary state of health, and go-
 “ ing abroad as usual; *and the deponent observed nothing about*
 “ *Mr Innes like want of sense or judgment, or any wise different*
 “ *in that respect from what she had ever known him.* Depones,
 “ That Mr Innes was a very careful frugal man about the
 “ affairs of his family, and very religious and well-disposed :
 “ That, evening and morning, he was punctual in his duty, and
 “ retired to his closet for that purpose : That he was in use of
 “ rising always about eight in the morning, and was displeased if
 “ breakfast was not ready for him by nine : He every Sunday
 “ evening, till within a few weeks of his death, sung psalms along
 “ with his family, and caused one of his sons read some portion of
 “ scripture : That, so far as the deponent can remember, she thinks
 “ Mr Innes was confined to the house from about the Martinmas
 “ preceding his death ; and when he was so, he was in use to
 “ make the deponent read to him in the scriptures, on the Sundays
 “ when she was at home, and the rest of the family at church ; and
 “ that Mr Innes seemed to attend to her reading ; for if she had
 “ mistaken

Defenders
 proof, p.
 1.—4.

“ mistaken any words, he used to put her right, although he was
 “ not looking on the book: *That he was also in use, till within a*
 “ *very short time of his death, to examine the deponent and his*
 “ *children, on the Sundays, upon religious subjects, and to give them*
 “ *many good advices and instructions: That he was a very sober*
 “ *and moderate man in his way of living; and the deponent*
 “ *never observed the least sign of want of capacity or judgment in*
 “ *him, to the last hour of his life.* And being interrogated for
 “ Mr Innes the claimant, depones, That she has seen the deceased
 “ Mr Alexander Innes himself looking upon the Bible, and, as she
 “ imagined, reading; but she never heard him read out; and
 “ that he used no spectacles on this occasion; and she does not re-
 “ member ever to have seen him use spectacles at all: nor can she
 “ say at what times this was when she saw him looking upon the
 “ Bible; but it was at some times during her service, which she
 “ cannot specify. And being further interrogated, depones, That,
 “ as the deponent thinks, the first winter after she entered to Mr
 “ Innes's service as aforesaid, Mrs Innes his wife being afraid of
 “ him, that some hurt or accident should happen to him when he
 “ was going out, as he frequently did, and would not stay in the
 “ house, she therefore spoke to the deponent to get a brother of
 “ hers, who was a little lad, to come and attend Mr Innes, and
 “ go along with him when he went out: That the boy according-
 “ ly came to Mr Innes's house, and waited upon him for some
 “ short time; but he would not keep him, or allow him to go
 “ with him; and said, that he was as capable to take care of him-
 “ self as he ever was; and desired the deponent to get some other
 “ place for her brother: and the boy was therefore dismissed; and
 “ the deponent knows that Mr Innes liked the boy very well, and
 “ wanted to get him another place; and she has heard Mr Innes
 “ speak to sundry persons to get him provided in one. Depones,
 “ That she remembers, sometime in the winter preceding the
 “ death of Mr Innes her master, and, as she thinks, some short
 “ time before his death, but will not say how long, one evening
 “ after Mr Innes had been sleeping in his chair, he got up and
 “ went towards the door, as if he had been going out; and
 “ being asked what he was wanting, he said, he wanted to be out,
 “ to go up stairs to his own house; and being told that he was in
 “ his own house, he asked them if they were sure of that: but
 “ immediately recollecting himself, seemed satisfied; and said,
 “ “ that

“ that he was wavering, and it was the infirmities of old age :
 “ That Mr Innes had no set time for sleeping, but would have
 “ taken a nap in his chair when sleep came upon him at any time ;
 “ though the deponent thinks that any sleeping which he had in
 “ this way, was after he was confined to the house. Depones,
 “ *That she does not remember ever to have seen Mr Innes mistake*
 “ *one of his children for another, when he saw them ; but she has*
 “ *observed, that when any of them had come in, he would have*
 “ *asked which of them it was : nor did he ever mistake the depo-*
 “ *nent for her mistress, or hear any of the family mention any*
 “ *such thing.* Depones, That she remembers, one day, as she
 “ thinks, in the time when Mr Innes was keeping the house, Mr
 “ Charles Innes had laid down his coat in his father’s room, at
 “ least in the room where the old gentleman was in use to dress,
 “ and some where near his cloaths, for Mr Charles did not ordi-
 “ narily lay his cloaths there ; that their two coats were not exactly
 “ of a colour, Mr Charles’s being whiter than his father’s ; and
 “ when the old man came to dress in the morning, he put on his
 “ son’s coat instead of his own ; and coming ben the house with it
 “ on, the deponent observed to him, that he had put on his son’s coat ;
 “ upon which he seemed offended, that Charles should have left his
 “ cloaths there, and said, that he had done it in a mistake ; and went
 “ back and put on his own coat. Depones, That in the time she ser-
 “ ved Mr Innes aforesaid, she remembers, that one day the lock of
 “ his closet-door went somehow wrong ; that this, to the best of her
 “ remembrance, was in the forenoon ; and Mr Innes would not go
 “ out of the house till he had got it mended ; and therefore imme-
 “ diately sent the deponent off for a blacksmith, as she thinks, one
 “ Taylor in Scot’s close ; who came that same day, and put the lock
 “ to rights : That Mr Innes was very pointed in keeping his closet
 “ entirely for his own use ; and the deponent never saw any per-
 “ son in it but himself, excepting once that David Innes his son was
 “ taking some books out of it, when his father was present. De-
 “ ponos, That Mr Innes has, on some occasions, mentioned to
 “ the deponent, that he was an old man, had a great number of
 “ children, and that he was frail, and it was no wonder if upon
 “ some occasions he was sometimes guilty of mistakes. And, up-
 “ on an interrogatory for Mrs Innes and her children, depones,
 “ That she the deponent acted as the principal servant in the house,
 “ and mostly did every thing about the old gentleman, while
 “ he was confined to the house, down to the day of his death.

“ And,

“ And, upon a further interrogatory for Mr Innes the claim-
 “ ant, depones, That she does nor remember ever to have heard
 “ old Mr Innes say, that his eye-sight was bad; and the deponent
 “ thought he saw very well. Depones, That she never saw the key
 “ of Mr Innes’s closet standing in the door at any time, during all
 “ the space of her service, for he always took better care of it; and
 “ that Mr Innes was not confined to his bed till within a very few
 “ days of his death.”

Defenders
 proof, p.
 4.—6.

Betty Tait depones “ That she entered servant to the now de-
 ceased Mr Alexander Innes at Whitfunday 1763, and continued
 “ in his family till Whitfunday 1665, Mr Innes having died in the
 “ month of March preceding the said last Whitfunday. And con-
 “ curs in every particular with Primrose Stewart, the preceding
 “ witness, who was the deponent’s neighbour-servant, during all
 “ the time that she was in Mr Innes’s family, with respect to Mr
 “ Innes’s being seized with a fit of the palsy about Martinmas 1763,
 “ and of his recovering therefrom; as to Mr Innes’s being a very re-
 “ gular, moderate, and pious man, as particularly specified in the
 “ deposition of the said Primrose Stewart; and that after he was
 “ confined to the house, the deponent used to wait upon him Sun-
 “ day about with her neighbour-servant, when the rest of the fa-
 “ mily were at church: That Mr Innes was a most religious ob-
 “ server of the Sabbath, and would allow no sort of work to be
 “ done in the house upon that day; but when the deponent wait-
 “ ed upon Mr Innes on the Sundays that she staid at home, she
 “ was constantly employed by him in reading from the scriptures;
 “ and he would have corrected her when she went wrong: That
 “ Mr Innes catechised his servants and children every Sunday even-
 “ ing, and sometimes upon other days; and gave them many good
 “ advices and instructions. *And this witness also concurs with the*
 “ *said Primrose Stewart, in saying, that she never observed the*
 “ *least sign of want of judgment or capacity about Mr Innes, to*
 “ *the last hour of his life.* Depones, That she has seen Mr
 “ Charles Livingston writer sometimes in her master’s house; and
 “ she remembers his being there at the time when Primrose Stew-
 “ art was sent for John Edgar, in manner above deposed to by
 “ the said Primrose Stewart: *That Mr Innes was then in his or-*
 “ *dinary state of health, and going about as usual.* And the de-
 “ ponent knows, that Mr Innes uplifted the Lammis reins of
 “ his

" his houses in Edinburgh immediately preceding his death ; for
 " the deponent saw some of the tenants in his house paying him
 " these rents, and he writing receipts or discharges therefor : That
 " the deponent cannot positively say how long it was that Mr In-
 " nes was confined to the house before his death ; but she thinks
 " it was sometime after the Martinmas immediately preceding that
 " he was so confined. And, upon an interrogatory for Mr Innes the
 " claimant, depones, That she never saw the deceased Mr Alexan-
 " der Innes use spectacles ; and does not know if ever he used any ;
 " and she has seen him writing without any. Depones, That she
 " remembers a boy was employed to attend Mr Innes when he
 " went out, sometime after he had the above fit of the palsy ;
 " but the boy only continued a few days, as the deponent thinks ;
 " for Mr Innes said it was quite needless, and would not allow
 " the boy to go with him. Depones, That she remembers, one
 " day, Mr Innes's closet-lock went wrong ; and the deponent
 " thinks, but is not sure, that she was sent to John Laing the
 " wright to come and mend it ; and the lock was accordingly
 " mended by John Laing that day ; and the deponent does not
 " think that any smith was sent for ; and Mr Innes was not out
 " of the house till the closet-door was mended : That the depo-
 " nent does not know what was the matter with the lock, she does
 " not know what was wanting to be mended about the door ; but
 " she understood it, that the lock had somehow gone wrong. *And*
 " *also concurs with the said Primrose Stewart, as to Mr Innes's*
 " *never mistaking any of his children, to the deponent's know-*
 " *ledge.* That the deponent's province was most in the kitchen,
 " excepting at dinner or such occasions ; and she had not so much
 " access as Primrose Stewart had to be about Mr Innes."

As the testimonies of these two witnesses, so clear and explicit
 with regard to Mr Innes's real situation, were at once decisive of the
 cause, no wonder that the petitioner should have set himself with all
 his might to make objections to them. The objections however are
 trifling to the last degree, and serve rather to confirm than diminish
 the credit due to their testimonies.

imo, It has been made an objection, that Primrose Stewart has
 said in her oath, that Mr Innes's fit of the palsy continued only for
 two days ; although the surgeons who attended Mr Innes at the
 time, have deposed, that he was confined to the house upon this

occasion, one of them says for ten days, the other says for about three weeks.

It would be a sufficient answer to this frivolous objection, to say, that the recollection of witnesses with regard to times, dates, &c. unless when assisted by writing, can be little depended upon; and that mistakes with regard to these particulars, are never dreamed of as an objection to a witness's credibility. In the present case, the surgeons themselves, who had the assistance of their books, have differed widely with regard to the continuance of Mr Innes's distemper. The fact is, that there is here no discrepancy at all betwixt the deposition of Primrose Stewart, and that of the two surgeons. Her words are, "That Mr Innes was seized with a severe fit of the palsy, in which he was bad for two days or so; but he recovered of this, and went abroad as usual." All that she says is, that the severity of the fit continued for two days or so; but she does not say, that Mr Innes was confined to the house for these two days, and no longer. This short continuance of the fit is precisely agreeable to what Mr Inglis the surgeon says, "That though at first he expected nothing but death, yet he immediately turned better, and daily recovered; and his senses also recovered along with his body." Indeed what earthly temptation could the servants have to be guilty of perjury in this trifling circumstance; or what possible influence could it have upon the cause either one way or other, whether Mr Innes's fit of the palsy was over in two days, or lasted for ten?

2d. It is said, that some of the particular circumstances mentioned in Primrose Stewart's deposition prove, that Mr Innes was at this time in a state of incapacity. Particularly there is mentioned the circumstance of his once forgetting, that he was in his own house; and of his asking when any of his children came into the room, which of them it was.

The first of these circumstances is sufficiently accounted for from Mr Innes's having just then awaked from a sleep which he was taking in his chair. This nap the petitioner formerly took the liberty of supposing to be entirely a fiction of the witness's own; but he seems now to have altered his opinion. In order to draw any conclusion from Mr Innes's asking, which of his children it was, when any of them happened to come in at the door; it would be necessary to know in what manner this happened, whether it was then light or dark, and many other circumstances. That there was nothing extraordinary

traordinary in all this, appears clearly from this circumstance, that the witness who has mentioned it, and who saw the whole, has disposed in the most express terms, that Mr Innes retained the use of his faculties to the last. These circumstances, on the contrary, add greatly to the credibility of this witness. If she had been disposed to favour the respondents improperly, how easy a matter would it have been for her to suppress these circumstances altogether?

3^{to}, The petitioner has further observed, that no stress can be laid upon the evidence of the maid-servants, "because they cannot be presumed to have had such intercourse with Mr Innes, as could enable them to form a judgment, whether he was in a state of incapacity or not."

This observation is not a little surprising. Except Mr Innes's own wife and children, who are parties, and disqualified from bearing evidence, it is asked, what person could possibly have such opportunity of knowing Mr Innes's real situation, as the servants who lived in family with him, and who had access to see him every hour and every minute of the day; or is it possible to conceive, that if Mr Innes had for many months been in a state of incapacity, these servants should at no time have noticed it? The only footing upon which the petitioner can possibly object to the evidence of these two women, is, by supposing, not that they were ignorant of Mr Innes's situation; but that, without the least temptation, or prospect of advantage, they have been guilty of the most wilful and deliberate perjury, in order to disguise it.

4^{to}, The petitioner has been pleased to complain, that the evidence of servants should have been resorted to at all. He says, "It would have been more proper to have called persons of character, and of the same rank with Mr Innes, visiting and keeping company with him daily, to have sworn to the general opinion of his capacity."

But why were not these persons of rank and character visiting Mr Innes daily, adduced by the petitioner himself, in order to prove his father's incapacity? If the petitioner knew of any such, it was no doubt his duty to have cited them upon his part. The fact is, that Mr Innes always lived in a retired way, and for the last years of his life was visited by no company, except his own near relations, whose connection with the parties disqualified them from being examined as witnesses. The respondents, upon their part, adduced as witnesses all the persons who had opportunity of being
much

much about Mr Innes during this last period of his life, and were not incapable of bearing testimony. Your Lordships will just now have an opportunity of judging whether the petitioner has observed the same method in conducting his proof.

Surgeons.

Next to the maid-servants, the persons who had the best opportunity to see and to judge of Mr Innes's situation, were Messrs Inglis and Hamilton, who attended him as surgeons for several months before his death; and one of whom (Mr Inglis) had been long acquainted with him, and a surgeon to his family for many years.

Defenders
proof. p.
6. 7.

Alexander Hamilton deposes, " That he, and Mr William
" Inglis surgeon in Edinburgh, are copartners in business; and
" Mr Inglis was surgeon in ordinary to the family of the late Mr
" Alexander Innes of Cathlaw: That the deponent remembers,
" that, in November 1763, Mr Innes was seized with a fit of the
" palsy, which was very severe at first; and the deponent was on
" this occasion called to visit Mr Innes; and which the deponent
" did at times, as he thinks, for about the space of three weeks,
" till Mr Innes recovered; and during that time Mr Inglis, the
" deponent's partner, also visited Mr Innes, as the deponent be-
" lieves, a great deal oftener than what the deponent did: That
" the deponent had no occasion to visit Mr Innes, after this fit
" of the palsy was over, till the month of June 1764, when Mr
" Innes was affected with a gravelly disorder, and other diseases
" incident to his advanced time of life; when the deponent and
" his partner were again called to visit Mr Innes, and gave him
" some medicines at times, for about two months, to ease his com-
" plaints: That the deponent believes, that, from this period,
" they were not directly called again till within a very little time
" of Mr Innes's death, as he was much in his ordinary way;
" though it is probable that they might order him to take a pill
" now and then, to assist nature, and keep his belly open, by way
" of a laxative medicine: That the deponent has also had occasion
" to be in the family after the paralytic fit above mentioned,
" and to see Mr Innes by the by: That Mr Innes was dull of
" hearing, and it was troublesome to enter into any particular
" discourse with him; and what passed between him and the de-
" ponent principally related to his disease and disorder: *That the*
" *deponent, upon putting any questions to him on this subject,*
" *always got pertinent and sensible answers; and never observed*
" *any signs of want of judgment or capacity, but such a languor*
" or

“ *or dulness as is incident to persons at his advanced time of life.*
 “ And the deponent remembers, that he had this idea of him at
 “ the times when he visited him as aforesaid ; and saw that it was
 “ troublesome to Mr Innes to discourse, and therefore avoided e-
 “ very thing further than what was necessary to know the situ-
 “ ation of his health. And, upon an interrogatory for Mr Innes
 “ the claimant, depones, That he was not acquainted with old Mr
 “ Innes before he was sent for to him when he was seized with
 “ the palsy as aforesaid : and it is the deponent’s opinion, that
 “ when Mr Innes was seized with the shock of the palsy afore-
 “ said, that he would not for some time know any person ; at least
 “ when the deponent visited him, when first seized, considered the
 “ fit so severe and universal, that it would end in death. But as
 “ Mr Inglis did mostly attend Mr Innes, during the continuance
 “ in this disorder, he will be better acquainted with Mr Innes’s
 “ state of mind, during the whole time this disease continued.
 “ Depones, That, as he thinks, once or twice when he visited
 “ Mr Innes, when he was either in bed or in his chair, the depo-
 “ nent cannot positively say which, upon the deponent’s coming in-
 “ to the room, Mrs Innes named him to her husband as coming
 “ to visit him, as Mr Inglis’s partner ; and that Mr Innes would
 “ have answered, Very well, and so held out his hand to the
 “ deponent to feel his pulse.

Mr William Inglis depones, “ That he was surgeon in ordi-
 “ nary to the family of the late Mr Innes of Cathlaw ; and was Defenders
Proof, p. 7.
 “ called to visit him in November 1763, when he was seized with
 “ a severe fit of the palsy or slight apoplexy : That the deponent
 “ thinks this disorder continued for about ten days, and perhaps
 “ longer : but though at first he expected nothing but death, yet
 “ he immediately turned better, and daily recovered, *and his senses*
 “ *also recovered along with his body* : That the deponent also vi-
 “ sited Mr Innes in summer 1764 ; and concurs with Mr Hamil-
 “ ton, the preceding witness, as to the disorders with which Mr
 “ Innes was then affected, which was pretty severe at that time ;
 “ for he had always a gravelish disorder upon him ; but at this
 “ time it was more severe than ordinary, and attended with a remark-
 “ able weakness of constitution ; and it was the deponent’s opi-
 “ nion, that he might then die ; but he got over this : and the
 “ deponent was not called to him again till some little time before
 “ his death. Depones, That he had been acquainted with the de-

“ ceased Mr Innes for many years, and was seldom in his house
 “ except in the way of his business: *That with respect to Mr In-*
 “ *nes's judgment or capacity, he did not observe any signs about*
 “ *him of any want of these, except such as was connected with his*
 “ *disease, in the time when he was afflicted with the paralytic dis-*
 “ *order above mentioned, and such as do naturally arise to every*
 “ *person from advance of years and decline of life; for no doubt*
 “ *the mind turns weaker with the body.*”

As the petitioner could not, with any sort of decency, use the same freedom with the depositions of these two gentlemen that he has done with those of the maid-servants; he has endeavoured to explain away the meaning of what they say. But the attempt is altogether in vain. Mr Hamilton has deposed, “ That he never
 “ observed any signs of want of judgment or capacity, but such a
 “ languor or dulness as is incident to persons at his advanced time
 “ of life.” And Mr Inglis has said, “ That with respect to Mr
 “ Innes's judgment or capacity, he did not observe any signs about
 “ him of any want of these, except such as was connected with his
 “ disease, *in the time when he was afflicted with the paralytic disorder*
 “ *above mentioned, and such as do naturally arise to every person*
 “ *from advance of years and decline of life.*” Is not this deposing
 as clearly as words can do it, that Mr Innes, except at the time
 that he was actually labouring under the attack of the palsy, was no
 more in a state of incapacity than every person is at his advanced
 age? and that, of course, his deeds are no more liable to reduction,
 than the deeds of every person who is arrived at the age of 83? The
 petitioner may twist Mr Inglis's expressions as much as he
 pleases; but it is impossible for him to give them any other mean-
 ing than this.

The petitioner likewise makes a faint objection to the *causa sci-*
entia of these two gentlemen, as if it was possible for any two men
 of common sense to be attending upon a person daily, and conver-
 sing with him about the nature of his distemper, and yet not be
 able to judge whether he was in a state of incapacity, such as the
 petitioner must represent his father to have been in at this time.

One thing is extremely remarkable. Although these two gentle-
 men, whose rank and character set them above all suspicion, and
 the servant-maids, were, of all others, beyond doubt the persons
 capable of giving the most explicit testimony, with respect to the
 situation of Mr Innes's faculties; yet the petitioner, who led his
 proof

proof first, did not think proper to cite either of them as witnesses. They were examined solely upon the part of the respondents: A certain proof, that the petitioner meant to examine, not the persons who knew most of the matter, but those whose depositions he expected would be most favourable to his side of the question.

Next follow the depositions of Andrew Forrest keeper of the coffeehouse, and Helen Black his wife, who were long acquainted with Mr Innes, and saw him almost every day; it being Mr Innes's practice to attend the coffeehouse most regularly, till within a very short time of his death.

Andrew Forrest deposes, " That he is aged fifty years or there-^{Defnders} by, and has kept a coffeehouse in Edinburgh for about these ^{proof, p. 8.} fourteen years bypast for himself; and, previous to that, was some years in what was called the Laigh coffeehouse, along with Mr Loch: That he was well acquainted with the late Mr Alexander Innes of Cathlaw, and had daily occasion to see him in the Laigh coffeehouse; and after the deponent took up a coffeehouse for himself, Mr Innes came there; and the deponent thinks he was in his coffeehouse every day that he came out, and sometimes frequently in the space of one day: That Mr Innes was very curious about the news, and sometimes would have read them himself; but his sight was not good, and it was very troublesome to him to wear spectacles, on account of a shaking in his head: but the deponent has seen him put on spectacles to read with; on which occasion he was obliged to hold them with his hand, at the same time that he was reading: but his general practice was to get some young gentleman or other present in the coffee-room to read the news-papers to him: That Mr Innes, when he came into the coffeehouse as aforesaid, and which he continued to do till, as he thinks, within five or six months of his death, *was in use frequently to converse with the deponent: and the deponent never observed any thing about Mr Innes like want of capacity or judgment; for, in his conversations with the deponent, every thing that he said was proper and sensible;* and Mr Innes would also frequently have spoke to the deponent's children, and the boy in the coffeehouse, and given them good advices as to their behaviour. And being interrogate for Mr Innes the claimant, deposes, That old Mr Innes was sometimes better, and sometimes worse dressed; and, on these accounts, his appearance at times might be different; and no doubt there
" was

“ was also a considerable difference as to the frailty of his body
 “ at the last from the first time that the deponent knew him. *But*
 “ *with respect to the faculties of his mind, the deponent never ob-*
 “ *ved any difference; for his conduct and behaviour was the same*
 “ *from first to last*: That he was a devout and religious man, and
 “ never took a dish of coffee or a glass of water, without first
 “ asking a blessing to it: That the deponent never had any transac-
 “ tions with Mr Innes in the way of his business or money-mat-
 “ ters.”

Defenders

Proof, p. 9.

Helen Black deposes, “ That she has been married about fifteen
 “ years; during which time, or the most of it, her husband has
 “ kept a coffeehouse for himself: That they have been twelve or
 “ thirteen years in the present coffeehouse; during which time, she
 “ had occasion, almost every day, to see the late Mr Alexander
 “ Innes, till within sometime before his death, which she cannot
 “ condescend upon: That she was very intimate with Mr Innes,
 “ and used very frequently to converse with him when he came
 “ into the coffeehouse; for he was a man well disposed, and con-
 “ versed sensibly upon religious subjects. *And concurs with An-*
 “ *drew Forrest her husband, in every particular, with respect to Mr*
 “ *Innes’s capacity and judgment, from first to last that she had oc-*
 “ *caſion to ſee him*; and as to his reading the news-papers; only
 “ she does not remember whether Mr Innes used spectacles or not.
 “ And adds, that sometimes when Mr Innes would have been con-
 “ versing with the deponent at the bar, he would have asked her
 “ who such a particular gentleman in the coffee-room was; and
 “ upon her telling him, if the gentleman happened to be of his
 “ acquaintance, he would have gone up to the gentleman; and asked
 “ him how he was, saying, he begged his pardon, he did not know
 “ him, his sight being bad. Depones, That among the last times
 “ she saw Mr Innes in the coffeehouse, she had heard that he had
 “ not been well sometime before; and when he came to the coffee-
 “ house, from which he had been absent for sometime, the depo-
 “ nent inquired at him about his health. He told her, that he
 “ had not been well, but that he was now better, thank God;
 “ and that he was at that time of life when he could not expect
 “ much health; and inquired after the welfare of the deponent
 “ and her family, and talked to her sensibly, as he used to do before.
 “ And adds, that Mr Innes always discoursed sensibly with the
 “ deponent, not only on religious subjects, but on every subject
 “ whatever;

“ whatever ; and he was in use frequently to put off the most of
 “ the day in the coffeehouse.”

Besides shewing in the general, that Mr Innes was of a sound and disposing mind at the time of executing the settlement in question, and for long thereafter ; your Lordships will attend to one circumstance which is mentioned by both these witnesses, *viz.* That Mr Innes’s eye-sight had failed him in some degree, and that this was the reason, as he himself said, of his sometimes not knowing at first his acquaintance when he met them in the coffeehouse.

The same thing is proved by the testimony of Janet Murray, one of the petitioner’s own witnesses. After recounting how Mr Innes had mistaken her in the street for one of his grand-daughters, and she had explained who she was, “ Mr Innes said, (so the witness depones), O! Mrs Carfrae, I beg your pardon ; my sight is
 “ so sore failed, that I scarce know my own children.” Pursuer’s proof, p. 24. H.

Several other witnesses, although not so material as those already mentioned, have given the same account of Mr Innes’s judgment being sound and entire, till just before his death. Thus David Skeil mealmaker, who lived at the foot of Mr Innes’s stair, and who saw him often, after mentioning some instances of his great accuracy and attention, depones, “ That they frequently conversed
 “ in his passing and repassing ; and the deponent never observed
 “ any signs of want of capacity or judgment about Mr Innes.” Defenders proof, p. 11. B. In like manner Ann Lows, who was a tenant of Mr Innes, and had frequently small dealings with him, after mentioning Mr Innes’s writing in her presence a receipt for rent, dated 2d February 1764, which is one of those produced, together with sundry other particulars, depones, “ That Mr Innes, in all his dealings with the de-
 “ ponent, acted fairly and justly ; and the deponent never saw any
 “ difference upon his judgment, or any signs of wanting it.” ib. p. 11. G.

The deposition of William Stewart writer in Edinburgh is extremely remarkable.

William Stewart depones, “ That, at Candlemas 1763, he took
 “ a house from the now deceased Mr Alexander Innes, and which
 “ house the deponent at present possesses, having entered thereto
 “ at Whitsunday 1763 : That when the deponent entered to this
 “ house, it stood in need of repairs, particularly one of the bed-
 “ rooms was infested with bugs, and the roofs wanted whitening : That in harvest-vacance 1763, the deponent, having re-
 “ moved with his family to country-rooms, wanted that these re-
 “ parations

“ parations should be made upon the house before he returned
 “ thereto ; and for this purpose he one day called at the house of
 “ Mr Innes, to acquaint him of it ; and he thinks told Mrs Innes,
 “ or Mr Innes himself, what he wanted : That, in a day or two
 “ thereafter, the deponent met with Mr Innes in Forrest’s coffee-
 “ house, and having gone up to speak with Mr Innes, he asked
 “ the deponent his name ; and having told him, they retired to
 “ a room, and conversed about the repairs of the house. And
 “ the deponent having also told him, that he the deponent was a
 “ tenant of Mr Innes’s ; and Mr Innes having asked where, the
 “ deponent also told him : That, after conversing anent the repairs,
 “ Mr Innes appointed to come in the afternoon to see what the house
 “ stood in need of ; and Mr Innes accordingly came along with a
 “ painter, and viewed the house very particularly. But he was
 “ very unwilling, and would not give the repairs which the depo-
 “ nent wanted ; for he refused to allow the roofs all to be whitened,
 “ or the bed-room all to be painted ; but ordered the painter to
 “ varnish over the place where the bed stood, with a view to de-
 “ stroy the bugs. Both the deponent and the painter insisted with
 “ Mr Innes to have sundry more things done than what he would
 “ agree to. But Mr Innes seemed positive, and was angry for
 “ their urging the thing so much, saying, that the young men
 “ now-a-days did not want houses, but palaces to live in : That
 “ the deponent thinks the painter’s name was Ross. Depones,
 “ That, at Candlemas 1764, Mr Innes came to the deponent for
 “ his rent ; and after he came into the room where the deponent
 “ was, he took out the receipt for the half-year’s rent, which was
 “ ready wrote out, all but the filling up of the deponent’s name
 “ and designation, and the signing of it ; and which he did, after
 “ asking the deponent his name : That the deponent laid him
 “ down three bank-notes and twelve shillings and sixpence in specie,
 “ as the half-year’s rent ; and he laid the discharge over the table
 “ to the deponent. But upon looking at the notes, and the depo-
 “ nent having observed that there was a Glasgow note among them,
 “ which he imagined Mr Innes would have no objection to ; Mr
 “ Innes looked at the notes, and then returned it, saying, he would
 “ not have it ; which obliged the deponent to send out a servant
 “ with it to get it changed ; and in the interim Mr Innes drew the
 “ receipt that he had granted towards himself, putting the rest of
 “ the deponent’s money towards him ; and which receipt, granted
 “ by

“ by Mr Innes to the deponent, bears date the 2d day of February
 “ 1764, and is marked by the deponent and commissioner, of this
 “ date, as relative hereto : That the rent of the deponent’s house
 “ when first taken, and for the first year, was only at the rate of
 “ seven pounds five shillings Sterling by year ; but the second half-
 “ year’s rent which the deponent paid, which was upon the 6th
 “ day of August 1764, conform to a receipt signed by Mr Alex-
 “ ander Innes, but not wrote by him : that this receipt bears the
 “ half-year’s rent to be three pounds fifteen shillings ; and when
 “ it was brought to the deponent by Mr Innes’s son David, the
 “ deponent objected to it, as being half a crown too much.
 “ However, he paid the whole demand. But next day David came
 “ to the deponent in the parliament-house, and returned him half a
 “ crown, saying, that his father had looked over his books, and said
 “ that it was as the deponent alledged : That the deponent had lit-
 “ tle occasion to know or be acquainted with Mr Innes further than
 “ what respected the particulars above mentioned. He was then
 “ a man old and frail, and seemed to be affected with a paralytic
 “ disorder ; *but the deponent considered him at that time as very*
 “ *distinct and sharp, having his senses about him ;* and the
 “ deponent remembers of saying to his wife after Mr Innes left
 “ the room, when the deponent paid the rent as above mentioned
 “ to Mr Innes, *That he was an old sickly boy.* And the deponent
 “ does not think that he ever spoke to Mr Innes after this, though
 “ he has frequently teen him upon the street, and in the coffee-
 “ house.”

The circumstances deposed to by this witness, show clearly,
 that Mr Innes’s judgment was still entire ; and the observation
 which Mr Stewart made to his wife, merits particular attention,
 as it proves what impresson the circumstances deposed to made
 upon the witness at the time, when there was no prospect of any
 question afterwards arising with regard to Mr Innes’s capacity or
 incapacity.

The respondents, in the last place, appeal to the deposition of
 Charles Livingston, the person who wrote the deed, and who was
 examined as a witness at the instance of the petitioner himself.
 The deposition is recited in the petition, and is so clear and dis-
 tinct, as not to stand in need of any commentary. Not only has
 Mr Livingston deposed as to his own conviction, that Mr Innes
 was not in a state of incapacity, but he has mentioned a variety of
 particulars

particulars in the course of his deposition, which appear to be entirely decisive. The note wrote by Mr Innes, containing directions for making out the disposition, the corrections which he made upon the scroll with regard to the names of the tenants, his observation upon the annuity settled upon his eldest son, are all instances of an exertion of sense and recollection, which could not possibly proceed from a person who was not at the time of a sound and disposing mind. Mr Livingston therefore had reason to say,

“ That at this time Mr Innes appeared to be sensible, and understanding what he was doing ; and that he never observed any failure of judgment attend Mr Innes, but what might be considered as incident to a person of his age.” The same thing is said by John Edgar, the other witness to the execution of the deed, and who was also examined on the part of the petitioner, “ That Mr Innes appeared to be an old man, and had a shaking in his head ; but the deponent did not observe any signs of want of judgment or capacity about him, but seemed to understand well enough what he was doing.”

If the facts deposed to by Mr Livingston be true, there is at once an end of the question. Neither has the petitioner been able to assign the least shadow of a reason, why your Lordships should refuse to give credit to this gentleman's testimony. Any objection arising from his connection with the respondents, the petitioner himself must have passed from, when he cited him as a witness ; and as to other objections, the respondents can discover none. Mr Livingston has had the honour of practising sometime before this court with unblemished reputation ; and it will not easily be believed, far less can it be taken for granted without evidence, that he would at once precipitate himself into a scene of most wilful and deliberate perjury. His deposition is in itself clear and consistent ; and what he says with regard to the situation of Mr Innes's judgment, which is the grand point, is confirmed by every one witness in the cause, without exception.

The objections to Mr Livingston's conduct in procuring the deed, it will be observed, are entirely distinct from what may be made to his credibility as a witness. The respondents will afterwards have occasion to consider the former at length ; but in the mean time they must be permitted to observe, that although Mr Livingston had been somewhat too zealous to serve his friends in this

Pursuer's
proof, p.
6. D.

Ib. p. 7. B.

this matter, it does not therefore follow that he was capable of telling, upon oath, a set of deliberate falsehoods.

It is true, that, in some former papers, much pains were taken to detect Mr Livingston in absurdities and contradictions; and that, in a memorial signed by the petitioner himself, his deposition was honoured with being made the subject of one of the most absurd, minute, and insignificant pieces of criticism that ever was exerted upon any piece of evidence. These, however, the gentleman who draws the petition, has very properly forbore repeating to your Lordships; and it is unnecessary to confute them.

The single observation in the petition which is properly levelled at the credibility of Mr Livingston's testimony, independent of his conduct at the time of executing the deed, which shall afterwards be considered, is founded upon the account which he gives of Mr Innes's executing a factory in favour of Charles his eldest son of the second marriage. The sum-total of the observation is, that Mr Mercer, another witness, when giving an account of this affair, after telling, that Mr Innes, before he signed the factory, caused one or two of the clauses to be read over to him several times, precisely according as Mr Livingston has deposed, observes it to be his opinion, "owing to his grandfather ordering the factory, or
Pursuers
proof,
P. 33. E.
"part of it, to be often read over, that he understood nothing
"farther about it, but only that it was a factory." Whereas it does not appear, that Mr Livingston made any such observation. Indeed the respondent will be pardoned to say, that it would have been somewhat wonderful if he had. Mr Mercer is only mentioning a private thought that occurred to himself; and when the preceding part of his deposition is attended to, the conclusion which he draws, does not seem at all to follow from the premises. Mr Innes refuses to adhibit his subscription to the factory, upon account of certain clauses which he observes in it. These clauses are read over several times; and then he subscribes. The natural conclusion surely which any person would draw from all this, is, that Mr Innes had caused these clauses to be read over till he understood them perfectly. The respondents therefore do not see how it can be made a ground of charge against Mr Livingston, that he did not make the same conclusion with Mr Mercer, who, it may be observed too, is a grandson of Mr Innes's by the first marriage, and after all, has only said, that his grandfather seemed to understand the paper to be a factory, which it certainly was.

written evidence. In support of these testimonies, the respondents will now state some written evidence upon their part.

1^{mo}, There are produced no less than *eleven* discharges of rent holograph of Mr Innes, all accurately and distinctly wrote. Three of these discharges are granted in the end of the year 1763; three of them on the 2d of February 1764, the month on which the disposition was executed; one of them on the 21st of February, the very day of executing the disposition; one of them in April thereafter, another in June, and two in August. And some of the witnesses have expressly deposed, that they saw Mr Innes write these discharges, when he came to get payment of his rent. When your Lordships thus see a person going about daily receiving payment of his rents, writing accurate discharges, containing the names of the tenants, the situation of the houses, &c.; can your Lordships possibly believe, that this man was in a state of incapacity, and that he is to be debarred from the privilege which the law gives to every person, of determining what should become of his effects after his death?

The petitioner says, that these discharges are inaccurate. But although repeatedly called upon, from the beginning of the process, he has not to this hour been able to point out a single one of the many inaccuracies with which they are said to abound. The respondents do, on the contrary, aver, that the discharges are accurate and distinct in every respect. Neither can it be said, that this was merely a mechanical operation, as the words of the discharges are varied, and adapted to the particular circumstances of each tenant; as your Lordships will see from copies of four of them annexed.

2^{do}, There is produced a cash-book, Holograph of Mr Innes, wherein the moneys received and paid by him from the 9th of February 1764, to the 6th of September thereafter, are regularly passed, precisely in the manner that he had observed for several years before. And particularly your Lordships will observe, the rents to which the receipts produced relate, are entered in the cash-book precisely of the dates of the discharges; a degree of accuracy to be met with in few persons, who have so little occasion for keeping accurate books as Mr Innes had.

The petitioner has also observed, that this cash-book is inaccurate; and particularly that the moneys paid and received are both entered in the same column; and "that this gross blunder in his

“ book is a certain sign, that Mr Innes did not retain his proper “ faculties.”

As to other inaccuracies, the respondents can say nothing, as none of them are pointed out ; but with regard to the last observation, the cash-book itself affords a most satisfying answer to it. Besides the articles during the years 1763 and 1764 now founded upon, this book contains Mr Innes's money-transactions for many preceding years, during the greatest part of his life. Yet this blunder which the petitioner is so fond of, runs through the whole book ; the entries of money paid and received being uniformly made one after another, according to their dates, in the manner of a merchant's waste-book. As this book was intended only for Mr Innes's own private use, and as the transactions entered in it are not very numerous, being chiefly payments of rents made to him by his tenants ; there was no occasion for drawing them out in the technical form of debtor and creditor. So that if there is any thing in the petitioner's observation, it must go the length of proving, that his father was in a state of incapacity during his whole lifetime.

The chief objection which the petitioner has insisted on to the respondents proof, is, That the witnesses have not pointed out special facts upon which their opinion of Mr Innes's incapacity was founded. He does not consider, that every one of these discharges and every one of the entries in the cash-book, is a particular fact, the truth of which cannot be disputed, and which is exclusive of the possibility of Mr Innes being then in a state of incapacity.

Thus your Lordships see it established both by parole and written evidence, That, at the time of executing the deed under challenge, Mr Innes was of a sound and disposing mind, capable of understanding the import of what he did, going abroad daily, and managing his affairs accurately and distinctly as usual.

The proof upon which the petitioner pretends to have it found, ^{Petitioner's Proof.} that a person who is acknowledged to have been going abroad, and managing the ordinary affairs of life, was yet entirely void of judgment, and incapable of adhibiting his consent, or understanding the import of a very plain settlement, and that too in the face of the irresistible evidence already stated, one would naturally expect must contain in it something uncommonly strong and convincing. An uncommon proof indeed it is. Composed, as your Lordships will see, of a multitude of witnesses, who had no opportunity

portunity of being about Mr Innes, and who themselves considered the circumstance deposed to, to be so insignificant, that several of them have expressly sworn, that Mr Innes retained his sense and judgment to the last. And not one has been so bold as to say, that he thought or believed Mr Innes to be in a state of incapacity, such as the petitioner is contending for. The petitioner himself seems now to be satisfied of this. When treating of this part of the cause, he is at the pains to hunt about for all the different modes of expression, of his father *being failed in his faculties, of imbecillity, dotage, &c.* But hardly once does he venture to say, that his father was not of a sound and disposing mind, capable of giving a legal consent, which is the only alledgeance that is relevant.

Head I.

The petitioner states his proof under two heads. *1mo*, He mentions, from the proof, instances before and after the date of the deed, wherein Mr Innes discovered this alledged failure of his memory and judgment.

Before making any particular observations upon the instances quoted under this head, which shall be done very shortly; the respondents must beg leave to submit to your Lordships one or two general observations.

1mo, It appears from the evidence formerly stated to your Lordships, that, amongst other infirmities which old age brought upon Mr Innes, his eye-sight had failed very much. This circumstance alone would be sufficient to account for by far the greatest part of the mistakes and errors which are laid hold of by the petitioner, as arguing a total want of judgment and capacity.

2do, Your Lordships will be informed, that the number of dwelling-houses belonging to Mr Innes within the town of Edinburgh, as appears from the rental thereof produced in process, was no less than twenty-nine, and all of them possessed by different tenants. As these tenants therefore were often changing and shifting about, as commonly happens; your Lordships surely will not think it any thing extraordinary, that Mr Innes should not be able at all times to carry about in his head the name of every one tenant that inhabited every one of these houses.

The first circumstance founded upon in the petition, is one mentioned in the deposition of Janet Murray, of her seeing Mr Innes in his own house, with what she thinks a guinea of silver lying before him, and of his insisting that he wanted a shilling, although Mrs Innes took every method to convince him, that there were really 21 shillings.

It appears from the deposition of this witness, that Mr Innes had just come from the bank, where he had been changing a large note; and it was not impossible that Mr Innes, at this time, may have missed some of the change. That a person should even be mistaken in reckoning 21 shillings, is nothing uncommon; and the positiveness naturally incident to old age, might prevent Mr Innes from acknowledging his error, even after he was satisfied.

But what shows clearly that this was merely a common incident, and no proof of Mr Innes's incapacity, is, that the witness herself, who could best judge of this matter, from the impression made upon her at the time by the appearance of Mr Innes, and from other minute circumstances, which can hardly be explained in words, has expressly deposed in a subsequent part of her oath, "That the deponent, at this time, thought Mr Innes sensible and sound in his judgment: That at this time Mr Innes, on account of his age, was very sore failed in his person from what she has known, or from the time that she was his servant; but that he was always very exact and sensible; and excepting the effects of old age, by which his person and his sight was sore failed, she never observed any defect in his judgment; for he always talked sensibly to her, and gave her many good advices."

Pursuer's
proof, p.
25. C.

Next comes the evidence of William Ross, a painter, who deposes, That, in the year 1763, he was employed by Mr Innes to paint a house of his; and that upon his going some months thereafter to demand payment of his account, Mr Innes denied that the account was due, and refused to pay him.

The respondents need hardly observe, that pieces of forgetfulness, such as these, are not very rare, even in persons who never were suspected for want of judgment. It is extremely probable too, that Mr Innes's memory may have failed a little, as is generally the case with men who arrive at his advanced period of life. It appears from a subsequent part of Ross's deposition, that having called a few days thereafter, Mr Innes, having by this time recollected that he had employed him, paid his account immediately. As to Mr Innes's taking notice of the optional clauses in the bank-notes, the petitioner is in a mistake, when he says that his father had once an office in the bank. Besides, these optional clauses were not introduced till the year 1760; and it was about this very time that a practice was first made of marking the notes, which might lead Mr Innes to

observe, whether the notes he was paying away had an optional clause, or were payable on demand; and whether they were marked or not by the tellers.

Upon the deposition of Elisabeth Mercer, it is unnecessary to make any particular remark. She only says, that Mr Innes called at her house for rent a short time after the rent had been paid; but that, upon being told this, he went away, saying at the same time, that he had all the payments of rent from his tenants accurately marked in his books.

The petitioner next appeals to the testimonies of Alexander and William Simpsoms, tellers in the Royal Bank. All that appears from the deposition of William Simpson, is, that Mr Innes once demanded from him, in the month of November, a half-year's rent which was not payable till Candlemas thereafter; and that he accordingly paid it, and got a discharge. As to the deposition of Alexander Simpson, if the petitioner had thought proper to quote that part of it which he refers to, your Lordships would have seen, that it rather affords evidence of Mr Innes's being then in a capacity for doing business. He gives an account of Mr Innes's demanding payment from him of a half-year's rent which had been already paid. But then he adds, that, upon his making the objection, Mr Innes told him, that he would immediately go home and consult his book; and that having done so, he returned immediately thereafter, and told Mr Simpson, that he found the rent was paid.

The next witness referred to is Agnes Bell. Her deposition amounts in substance to this: That, in April 1764, Mr Innes came to her mother, who was his tenant, and asked payment of the half-year's rent, which was only to fall due at the Whitsunday thereafter: That, in June thereafter, Mr Innes came to the deponent's house in Miln's square, which had been before possessed by one Mrs Cowan; and said, that she was due him the rent; but that he returned afterwards, and said that he had looked his books, and was satisfied of his error.

In all these circumstances the respondents can observe no symptoms of incapacity. Mr Innes's reason for demanding payment of rent beforehand, as the witness has expressly deposed, was, that he was in straits for money, and imagined that her mother would be at that time full of money; Lord Marischal, who had lodged with her, having left her house immediately before. And his reason for ima-

gining

gining that Mrs Cowan still lived in the house in Miln's square, as taken notice of by the witness, is, that Mrs Cowan had a tack of that house for some years to run; and Agnes Bell had only removed thither upon a sublet from her.

This circumstance of Mr Innes's demanding rent before it was due, is also proved by the oath of Mrs Hutton; and likewise by Mr Hutton, who by the by deposes, *That, on account of the want of sight, he cannot write or sign his name*; although that part of his deposition the petitioner has neglected to print.

But the reason of this is obvious. Mr Innes must often have been pinched for money. His income was but moderate, and he had a numerous family to maintain. It would have been somewhat more to the purpose, if the petitioner could have brought evidence of Mr Innes's neglecting to demand payment till long after the term, or his taking less than was his due. But it is extremely observable, that the whole of Mr Innes's errors and mistakes that appear from the proof, are in his own favour, and not one of them against him. The contrary of which must have been the case, if they had proceeded, as the petitioner pretends, from incapacity or want of judgment. As to Mr Innes's sometimes inquiring at his own houses who lived there, as mentioned by some of the witnesses, besides the difficulty of carrying in one's head so great a number of tenants, Mr Innes might very naturally be desirous to know whether his houses were possessed by the tenants themselves, or if they had sublet them to others.

The petitioner next mentions as a surprising instance of his father's imbecillity, a circumstance which is mentioned in the depositions of William Innes barber, James Innes his son, and of Mrs Innes the son's wife, that Mr Innes, when he came to the shop in order to be shaved, went to the door of a back-room, and inquired who lived there, although the house belonged to himself.

There is a considerable difference betwixt the witnesses in their manner of telling this story. Mrs Innes tells it in this manner:

"Depones, That she remembers one day that Mr Alexander Innes
 "came into the kitchen, and went forward till the wall held him
 "again; and then asked, *what room was there*; and the deponent
 "having answered, that there was no room, but the kitchen-wall:
 "*That the deponent cannot say, that she made any particular observa-*
tions as to the questions asked by Mr Innes at this time, or did impute

Pursuer's
 proof, p.
 16. E.

"them

" *them to any cage* ; but she thinks she told her husband, and mentioned what had passed to him."

According to this account of the matter, there was nothing surprising in Mr Innes's mistaking the wall of the kitchen for the partition of a room. And accordingly Mrs Innes herself seems to have considered the question, as containing nothing extraordinary. And even according to the account given by William and James Innes, it may be easily accounted for, from the failure of Mr Innes's eye-sight, and other circumstances already mentioned. And they themselves depone, that they considered it to be owing to the frailties commonly incident to old age.

With regard to the incident of the halfpence which Mr Innes dropt in the shop, as mentioned in the depositions of these witnesses ; it is by no means impossible, that one or two of the halfpennies may have actually been lost on this occasion. And with regard to the anxious searches which were made for such a trifle, they can only be imputed to a part of Mr Innes's character which would naturally gain strength with his years, and which a son who had the least regard for the memory of his father, would rather have chosen to conceal.

The incident of the two barber-lads, Watson and Sharp, passing themselves once or twice upon Mr Innes for their companion Swan, is of a-piece with the rest of the proof brought by the pursuer. Nothing indeed can be conceived more ludicrous, than to argue, that a person is in a state of incapacity, because he does not take the trouble of examining narrowly the features of the barber-lads who happen to shave him. The whole three appear to have been much of a size, and might very well pass for one another, upon a person whose eye-sight was failed, or who was paying so little attention to their faces, as a person generally does to a circumstance so entirely insignificant.

The last deposition quoted upon this head, is that of Mr William Macghie, narrating the particulars of what happened at a meeting betwixt him and Mr Innes, at paying his rent in August 1764.

But there is one circumstance in Mr Macghie's oath, which clearly explains the whole. He says, that this happened in the forenoon, after they had drank together a mutchkin of white wine. The quantity which they drank, the petitioner says, is small ; and no doubt there are many persons on whom it would have no effect. But to a person of Mr Innes's great age, and who, during his whole

life,

life, had lived in the most temperate manner; the respondents cannot see a doubt, that half a mutchkin of white wine drunk hastily in the forenoon, would be sufficient to throw him into some sort of disorder, and to account for all that happened. Besides, this circumstance did not happen till August 1764, many months after the date of the disposition now under reduction.

The second head of positive evidence stated in the petition, is, Head II. That Mr Innes was at different times unable to distinguish the children of his own family from one another; and that the respondents themselves who lived in the house with him, were sensible of his incapacity, and have been heard to own it upon many different occasions.

The first particular instance of his mistaking any of his children, is that mentioned by Thomas Waddel; who depones, in substance, That, upon his coming to Edinburgh, with James one of Mr Innes's sons, and a son of the petitioner's, Mr Innes asked who they were; and upon being told, that it was his son and grandson, he asked which of them was his son, and which his grandson.

This witness is not positive with regard to the particular time of the day when this happened. Mr Innes resided in a house in the Cowgate, which was very indifferently lighted; and it was probably somewhat dusky when the two boys arrived. Besides, Mr Innes's eye-sight was much failed, so that it is not at all wonderful that he did not distinguish them at the very moment they entered the door. This incident too, if it had been in the least degree material, happened in the end of autumn 1764, many months after the execution of the settlement under challenge.

Andrew Ramfay servant to Mr Alison, who is married to a grand-daughter of Mr Innes's, deposes to something of the same kind. This witness, however, mentions not one word with regard to the time or circumstances of these supposed mistakes. But there is one thing in his deposition which shows clearly, that they must have proceeded from the failure of Mr Innes's eye-sight. He depones, "That after Mr Innes was got into the room, and found Pursuer's "who was there, he seemed to know them very well." If Mr proof, p. Innes's not knowing who was in the room, had proceeded from 30. G. the failure of his judgment, it would have been as difficult for him to have recollected, and spoke properly to them, after being told their names, as before. The respondents, on the contrary, appeal to the testimony of the two servant-maids formerly cited, who

could not possibly be ignorant of this circumstance; and who have expressly deposed, that they never observed Mr Innes to be in the use of mistaking one child for another.

The petitioner has also laid some stress upon a ludicrous story of one of the children introducing to their father Mr James Binning, under the name of Lord Binning, and of Mr Innes calling him his Lordship. But whether in joke or in earnest, does not certainly appear. The witness indeed says, "That Mr Innes did not seem to know him all the time." But he adds a circumstance which sufficiently explains the whole. He deposes, "That *for* Pursuer's " *some years before his death*, when the deponent had met Mr Innes, proof, p. " he would not have known the deponent; and the deponent 20. C. " would have been obliged to tell and to explain to Mr Innes " who he was." If any weight, therefore, is to be given to the circumstance of Mr Innes not knowing this witness, it must have the effect of carrying back Mr Innes's incapacity for several years before his death; which is farther back than appears from any one circumstance of the proof, and farther than the petitioner himself has pretended to alledge. This witness, it will also be observed, resided in the country, and Mr Innes might very naturally forget him.

In order to prove that the respondents themselves have acknowledged their father's incapacity, the petitioner refers to the depositions of Margaret Capie, Henrietta Inglis, and Alexander Whyte. All that appears, however, from these depositions, is, that David and Gilbert, two of Mr Innes's youngest children, both at that time about fourteen, allowed themselves sometimes to speak disrespectfully of their father, and said that he was *doited*. But it could hardly have been expected, that any undutiful expressions of this kind dropping from two children, and proceeding from that degree of contempt with which boys of that age too frequently regard the infirmities of old age, were seriously to be founded on in a court of law, as a deliberate acknowledgment of the whole respondents, that their father was in a state of incapacity.

That the other respondents entertained very different ideas with regard to their father, is clear from one single circumstance, which is accidentally brought out in the evidence. Mr Livingston deposes, "That meeting with Charles Innes, the eldest son of the second marriage, at the creek, the deponent spoke to him upon this subject; and told Mr Charles Innes, that as the children of the second marriage seemed to the deponent to have small pro-
visions

“visions made to them for such a numerous family, that he the deponent thought that Mr Charles should move his father to settle his affairs: That Mr Charles answered, That he knew his father's temper was such, that he did not like to see a disposition in any person to be greedy; and that therefore he did not chuse to speak with his father upon this subject: That the deponent upon this mentioned to Mr Charles Innes, that he should speak to Mr George Innes cashier in the Royal Bank, who was nephew to the old gentleman, to see if George Innes knew whether old Mr Innes had made a settlement or not; and if none such was made, that Mr George Innes should speak to his uncle to make one.” If Mr Charles had been sensible that his father was in such absolute dotage, and so entirely under the management of his wife and children, as the petitioner pretends, what occasion was there for all this management? Why did he not speak directly to his father? or why was he afraid of offending him, by talking upon a subject which he thought might be disagreeable?

Such are the grounds upon which the petitioner has taken up the ungracious plan of setting aside his father's deed upon the head of incapacity. The respondents are sensible, that they have considered the circumstances of the proof more minutely than was necessary. They are, for the most part, trifling and irrelevant to the last degree. It may indeed be true, that Mr Innes, who was by this time upon the decline of life, did not enjoy the same vigour, either of body or mind, which he had done at former periods; and to this natural decline the petitioner's own witnesses have imputed those errors and mistakes which they have deposed to. But is this a circumstance at all peculiar to the old age of Mr Innes? Is it not a well-known though melancholy truth, that a man at eighty years is seldom or never equal to what the same man was about thirty or forty? In order therefore to support his plea, the petitioner is under the absolute necessity of maintaining, that this natural decay, which is the common lot of all mankind, is to be regarded by your Lordships as a legal incapacity; and that, after passing a certain number of years, a man is to be presumed unfit for giving his consent, or judging of the import of any deed. Unhappy indeed would be the condition of old age, if this was once established; if, besides the gradual decay of vigour and spirits, an old man was to be reduced by law to a state of second minority, and deprived

deprived of the consolation, one of the greatest that he can enjoy, of distributing his effects among his children or relations, according to their merit, or according to that degree of duty and affection with which they have supported his declining years.

There is not a single deposition in the whole of the petitioner's proof, that is not entirely consistent with the supposition, that Mr Innes was still in a state of capacity, and able to judge of the import of a deed. Whereas the depositions adduced on the part of the respondents, and which are strongly supported by written evidence, are exclusive of the possibility of supposing that Mr Innes was in a state of incapacity. It is a proof which cannot fail, except by supposing, that eight or ten persons of good character have, without the least visible temptation, or prospect of advantage, been guilty of wilful and deliberate perjury.

Art. III.

The petitioner, in the last place, endeavours to show that undue means were used in obtaining and executing the deed. As this part of the petition seems to resolve almost entirely into an accusation against Charles Livingston, the writer of the settlement; the respondents might perhaps, without doing any hurt to their cause, have passed it over entirely. In justice however to the character of a gentleman, which has been most unjustly attacked, the respondents will take the liberty of making a few observations upon those circumstances which the petitioner has founded upon in order to justify this accusation.

The petitioner, in the first place, seems to take it highly amiss, that Mr Livingston should have interfered in this matter at all. But the respondents have not yet been able to discover for what reason. They do, on the contrary, maintain, that Mr Livingston's conduct throughout the whole affair has been entirely proper, and such as became a man of business. From the circumstance of his father's being intrusted with the custody of the contract of marriage, Mr Livingston had occasion to observe, that the provisions therein made in favour of the children of the second marriage, were extremely unsuitable; as indeed what person could possibly be of a different opinion? Could any thing therefore be more natural or proper, than to suggest this to Mr Charles Innes, the eldest son of the marriage, his relation and acquaintance; and to advise him to put his father upon making some provision for his young family? Except giving this advice to Mr Charles, it does not appear, that Mr Livingston had the least concern in this affair, more or less, till

such time as he was sent for by Mr Innes, in the way of his profession as a writer, in order to draw up the settlement.

The petitioner, in the next place, complains, that the execution of this settlement was gone about in a secret and clandestine manner; and he laments in particular, that Mr Livingston has not been at the pains to preserve evidence for his own justification, either by keeping the note which Mr Innes gave him, containing directions for drawing the deed, or by introducing some indifferent person to be present when the deed was read over to Mr Innes.

This article of the charge is indeed a very singular one. The settlement of a person's affairs, to take place after his death, is a circumstance which most people are anxious to conceal, even from their nearest relations. The writer of the deed alone is generally privy to it; and it is believed, that every man of business understands it to be a part of his duty, sacred and inviolable, not to divulge the particulars of such settlements to any one person whatever. The respondents would gladly know what persons were privy to the disposition of moveables produced by the petitioner, or to the partial dispositions executed by Mr Innes in favour of the respondents, which appear to have been kept a secret from the whole family till after his death. With regard to Mr Innes's holograph note, Mr Livingston has expressly deposed, that Mr Innes desired it back from him; and it would have been impossible for him surely to frame a pretence for keeping it. As to introducing Mr Edgar the witness, or some other indifferent person, to hear the deed read over to Mr Innes; the respondents believe, that most persons would be a good deal surprised, if the writer of a settlement was to bring a stranger with him, in order to hear the contents of the settlement read over before it was signed. A person who is brought to witness a deed, is seldom allowed to know any thing about the matter, except barely seeing the granter adhibit his subscription. But when a party is determined to find fault, there is scarce any thing that may not be laid hold of. Put the case, that Mr Livingston had acted precisely as the petitioner would have him, the respondents do maintain, that the affair would have been greatly more suspicious than it is. Had this been the case, your Lordships, in all probability, would have had the petitioner arguing something in this manner. Why go out of the ordinary road in executing this settlement? Why introduce persons to hear the deed read over? Why take so much pains to se-

O

cure

cure against any future challenge? Why all these precautions, if nothing unfair was in view; and if nothing was intended but the execution of an ordinary settlement? The respondents must, for their part, confess, that if Mr Livingston had gone one step out of the ordinary road, and had taken all these precautions to secure himself, they would have then thought there was just ground for suspecting, that Mr Livingston was sensible, at the time of the grantor's incapacity, and that he was doing a thing which might stand in need of justification.

Another ground of charge against Mr Livingston is, his inserting in the settlement a clause with regard to moveables.

This clause the petitioner is desirous to consider as put in without any authority from Mr Innes. But Mr Livingston himself has given a very satisfying account of this matter in his oath, which is alone a sufficient answer to this part of the accusation. "Being interrogate, How he, Mr Livingston, came to mention to Mr Innes, or to put into the scroll, the disposition to moveables, seeing no such thing was mentioned in the note, and seeing that he, the witness himself, thought, that the provision given to Mr Innes the claimant was too small? depones, That, after reading over the note, he conversed with Mr Innes upon the subject of his settlement; and as he understood from Mr Innes, that he wanted to make a general settlement of all his affairs, and to give all the effects he then had to his children of the second marriage, made the deponent mention moveables, which he saw was not contained in the note." The fact, however, is, that Mr Innes had no moveables of any consequence. As to his household furniture which the petitioner mentions, Mr Livingston must have known, that it was provided to Mrs Innes by her marriage contract. If Mr Livingston had been capable of deposing to any thing that was not true, how easily might he have avoided this difficulty, by saying, that the note contained directions with regard to the moveables, as well as the houses: If the note had been a fiction of his own, he would most certainly have made it comprehend both.

The petitioner has likewise gone the length of saying, that the whole of this deed is the fabrication of Mrs Innes. But this observation might have been spared. Unless the whole circumstances of Mr Livingston's deposition are to be regarded, from first to last, as a set of deliberate falsehoods, of which the petitioner has not offered one reason to convince your Lordships, except that the deposition

deposition is not to his liking, there can be no doubt, that the deed was concerted and framed by special directions from Mr Innes himself.

The respondents will only observe one thing further, that if Mr Livingston, who is a man versant in business, had been capable of imposing upon the old man, by making him sign a deed, when he did not comprehend what he was about, he would unquestionably have taken care to secure the success of his plan in a more effectual manner than he did. The disposition, after being executed, would certainly have been put into the hands of Mrs Innes, or one of the respondents. Instead of which, it was delivered to Mr Innes himself; and it contained a power of revocation. By which means, the whole plan might have been disappointed, by Mr Innes's signing a revocation, or by putting the deed in the fire. Either of which it was in his power to have done any one moment of his life. Whereas if Mr Innes had truly been in the situation which the petitioner pretends, it would have been equally easy for the persons concerned, to have secured this settlement against the possibility of any alteration.

The petitioner indeed has all along been somewhat too liberal of his reflections against this gentleman. In this petition he is somewhat more decent than in some of the former papers. But still he ought to have considered, that the character of a man of business cannot even be suspected, without doing hurt to his interest; and that therefore it ought never to be attacked in this public manner, except upon the best and most infallible grounds.

With regard to the undue importunities and solicitations which are said to have been employed upon Mr Innes in order to induce him to execute this settlement; the respondents can see nothing of this kind in the proof. And supposing it had been clearly proved, that solicitations were made use of, the respondents do not see of what service this could be to the petitioner's cause. They cannot conceive, that there was any thing improper in children who were miserably provided, endeavouring to obtain from their father a comfortable provision. Nor can they believe, that their doing so would have been regarded by your Lordships, as affording any the least objection to the validity of this settlement.

The respondents are sensible, that they have considered the several points stated in this petition at greater length than was necessary. But they were anxious to omit nothing that might be
thought

thought in the least degree material. And they flatter themselves, that your Lordships, now that the cause is fully before you, will have no difficulty to adhere to the Lord Ordinary's Interlocutor, and to find expences due.

In respect whereof, &c.

ROBERT BLAIR.

ions conceived in the deceased t Wife in favours of the Chil-

with an an-
petitioner,

Ditto	—	90	0	0	
Ditto					L. 1267 15 6 $\frac{2}{3}$
Ditto	to accompt of his share,				425 3 0
Mr Innes	littlejohns sons to Grizel,				
zel	are,	—			107 8 11
hold					<hr/>
					1800 7 5 $\frac{1}{3}$
Conqu					<hr/>
					L. 4061 12 4 $\frac{1}{3}$

am Inneses and Alexander					
Grizel, as above,	—				L. 1800 7 5 $\frac{2}{3}$
is	L. 565	6	2 $\frac{2}{3}$		
—	565	6	2 $\frac{2}{3}$		
—	565	6	2 $\frac{2}{3}$		
					<hr/>
					1695 18 8
paid per	—				<hr/>
					L. 104 8 9 $\frac{1}{3}$

In
and
the
died
wou

quest at the sum the petitioner says it amounted to;
42, when that estate was given to the petitioner;
he 1742 till the 14th March 1765, when Mr Innes
these sums to them till Mr Innes's death; all which



ACCOMPT of the fums paid, and fubjects difpofed by Mr Innes to his children of the firft marriage, in full of the provifions in their favours contained in their mother's contract of marriage.

	Principal fums.	Interest thereof till Mr Innes's death.
To Alexander Innes the estate of Cathlaw, by a difpofition, dated the 30th January 1740, as valued <i>per</i> Meff. Scott and Sawers,	L. 3738 1 5	
To the rents of the faid estate from the 14th March 1742, to the 14th March 1765, (the time of Mr Innes's death), at L. 100 Sterling <i>per annum</i> ,	- - -	L. 2300 0 0
To the furniture in the houfe of Cathlaw, which fhall be fuppofed at the fum of 1500 merks, which Mr Innes, by his contract of marriage, was obliged to beftow on houfehold-furniture. <i>Inde</i> ,	83 6 8	
Interest thereof from the 14th March 1742 to the 14th March 1765, (the time of Mr Innes's death),		95 16 8
To the annuity of L. 108 Scots, with which the difpofition 1764 is burdened in favours of Alexander Innes, which, at 10 years purchase, is,	90 0 0	
To William Innes, <i>per</i> his bill, dated the 9th April 1741,	100 0 0	
To intereft thereof from the 14th April 1741, to the 14th March 1765, (the time of Mr Innes's death), 23 years 11 months,		119 11 8
Carried over,	L. 4011 8 1	L. 2515 8 4

	Principal sums.	Interest thereof till Mr Innes's death.
Brought over,	L. 4011 8	1 L. 2515 8 4
<i>Item, per bill 11th July 1741, pay- able 1st August 1741, -</i>	50 0 0	
Interest thereof from the 1st August 1741, to the 14th March 1765, (the time of Mr Innes's death), 23 years, 7 months, 14 days,		59 1 1
<i>Item, per bill 22d August 1741, payable 10th September then next, - - -</i>	50 0 0	
Interest thereof from the 10th Sep- tember 1741, to the 14th March 1765, 23½ years, - - -		58 15 0
<i>Item, per bill, dated 24th December 1743, payable 10 days after date,</i>	10 0 0	
Interest thereof from the 3d Janua- ry 1744, to the 14th March 1765, 21 years, 2 months, 10 days, - - -		10 11 11
<i>Item, per receipt, dated 31st July 1744, - - -</i>	10 0 0	
Interest thereof to the 14th March 1765, 20 years, 7 months, 14 days, - - -		10 6 0
<i>Item, per bill, dated 26th November 1751, - - -</i>	100 0 0	
<i>Item, per bond to Mr George In- nes, retired 13th November 1751,</i>	105 3 0	
To Alexander and David Littlejohns sons of Grizel Innes, <i>per</i> accompt,	107 8 11	
To Margaret Innes, <i>per</i> contract of marriage with Archibald Hart, dated 24th May 1735, 3000 merks, - - -	166 13 4	
Interest thereof to 14th March 1765, 29 years, 9 months,		247 18 4
To Janet Innes <i>per</i> contract of mar- riage with William Mercer, da- ted 5th March 1736, -	166 13 4	
Carried forward,	L. 4177 6 8	L. 2902 0 8

	Principal sums	Interest thereof till Mr Innes's death.
Brought forward,	L. 4777 6 8	L. 2902 0 8
Interest thereof to the 14th March 1765, 29 years, - -		241 13 4
To Isobel Innes, <i>per</i> receipt by her and her husband, dated 18th Ja- nuary 1733, to accompt of pro- visions in her mother's contract of marriage, 400 merks, -	22 4 5 $\frac{1}{3}$	
Interest of said 400 merks to the 14th March 1765, 32 years, 1 month, 24 days, - -		35 14 3
To ditto, <i>per</i> ditto, 14th January 1734, 200 merks, - -	11 2 2 $\frac{2}{3}$	
Interest thereof to the 14th March 1765, 31 years, 2 months, -		17 6 3
To ditto <i>per</i> ditto, 28th January 1735, 200 merks, - -	11 2 2 $\frac{1}{3}$	
Interest thereof to the 14th March 1765, 30 years, 1 month, 14 days, - -		16 14 7
To ditto <i>per</i> ditto, 26th January 1736, 200 merks, - -	11 2 2 $\frac{2}{3}$	
Interest thereof to the 14th March 1765, 29 years, 1 month, 12 days, - -		16 3 5
To ditto <i>per</i> ditto, 1st February 1737, 200 merks, - -	11 2 2 $\frac{2}{3}$	
Interest thereof to the 14th March 1765, 28 years, 1 month, 12 days, - -		15 13 4
To ditto, <i>per</i> her contract of mar- riage with John Stenhouse, da- ted 23d May 1737, 3000 merks, -	166 13 4	
Interest thereof to the 14th March 1765, 27 years, 9 months, 19 days, - -		231 13 6
Carried over,	L. 5010 13 4	L. 3476 19 4

	Principal sums.	Interest thereof till Mr Innes's death.
Brought over,	L. 5010 13	4 L. 3476 19 4
To Johan Innes, <i>per</i> bond to William Taylor her husband, dated 10th July 1751, payable against Mar- tinmas then next, - -	240 0 0	
Interest thereof from Martinmas 1751, to 14th March 1765, 13 years, 4 months, - -		159 0 0
<i>Item</i> , To ditto, two houses in the Old Assembly close, <i>per</i> disposition, da- ted the 10th July 1751, which then gave of yearly rent about L. 14 Sterling, and which at 12 years purchase is, - -	168 0 0	
To the rents of these two houses, from Whitsunday 1751 to the 14th March 1765, - -		189 0 0
	<hr/> L. 5418 13	4 L. 3824 19 4

RECEIPTS

RECEIPTS granted by the deceased Alexander Innes to his tenants.

I Alex^r Innes *senior* of Cathlaw, grant me to have received from W^m Innes barber in Edinburgh, the sum of three pounds, ten shillings Sterling money, as half a year's rent to Martinmas last, of two houses, q^h he possesses of me in y^e Cowgate of Edinb^r, q^{ch} half a year's rent is hereby discharged, as witness my hand, at Edin^r the thirty first day of Decem^r, One thousand seven hundred and sixty three years.

L. 3, 10 Sterl^{ls}

(Signed) *Alex^r Innes.*

I Alex^r Innes *senior* of Cathlaw, grant me to have received from M^r William Stewart *jun^r* wry^r in Edin^r, the sum of three pounds twelve shillings and sixpence Sterling money, as half a year's rent to Martimas last past of a house belonging to me and possess by him, lying in Patrick Steil's close in Edinburgh, q^{ch} half year's rent is hereby discharged. In witness whereof I have written and subscribed these presents at Edinburgh, the second day of February, One thousand seven hundred and sixty four years.

L. 3 : 12 : 6 Sterling.

(Signed) *Alex^r Innes.*

I Alex^r Innes *senior* of Cathlaw, grant me to have received from M^r James Gilliland goldsmith and jeweller merchant in Edinburgh, the sum of four pounds Sterling money, as half a year's rent to Martimas last past of a house belonging to me, possess by him, in Edinburgh in Blackfriars wynd, q^{ch} half year's rent is hereby discharged. In witness whereof I have written and subscribed these presents at Edinburgh, the twenty first day of February, One thousand seven hundred and sixty four years.

(Signed) *Alex^r Innes.*

I Alex^r Innes *senior* of Cathlaw, grant me to have received from William Innes perewig maker in Edinburgh, the sum of three pounds ten shillings Sterling money, as half a year's rent from Mertimas last past to the term of Whitfunday last past, of two houses belonging to me posselt by him, fronting the high street of the Cowgate of Edinburgh. In witnes whereof I have written and subscriv'd these presents at Edinburgh, the seventh day of August, One thousand seven hundred and sixty four years.

L. 3, 10 Ster¹

(Signed) *Alex^r Innes.*

EXCERPT from the deceased Alexander Innes's call-book.

1763.

Dec. 31. Cash from Mr Innes barber in Edinburgh,
half a year's rent to Martimas last of two
houses in Edinburgh, - - - L. 3 10 0

1764.

Feb. 2. Cash from Mr Wm Stewart wryter in Edin',
half a year's rent to Martinmas last, of a
house in Pat^k Steel's clofs - - - 3 12 6

21. From James Gilliland goldsmith and jeweler
merch^t in Edinburgh, half a year's rent
for a house in Blackfriar wynd, to Marti-
mas last past, - - - - - 4

Aug. 7. From William Innes wigmaker in Edinburgh, half a year's rent of two houses in y^e Cowgate, from Martimas last to Whitfunday last,

